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Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID A. FERNANDES, JR.,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

On Petition For A Writ Of Certiorari To The Connecticut Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Connecticut's juvenile transfer statute, Connecticut General Statute Section 46b-127(b), does not state that 15 year old juveniles arrested for class D felonies shall have due process hearings at any court, be it juvenile court or adult court.

There are three questions presented.

1.) In overruling the Connecticut Appellate Court's decision which held that the petitioner's due process rights were violated when he was not afforded a due process hearing at juvenile court pursuant to Connecticut's juvenile transfer statute, did the Connecticut Supreme Court commit constitutional error when it interpreted the statute to require that a due process hearing occur at adult court, in violation of this Court's rule of lenity?

2.) Should a uniform rule of lenity require that when a penal statute "is susceptible of two interpretations, the one more favorable to the defendant must be chosen unless . . . the harsher position is unambiguously correct?" *United States v. Granderson*, 511 U.S. 39, 54 (1994).

3.) If *United States v. Granderson* does articulate the correct standard, should the petitioner's conviction be vacated because this rule of lenity standard was not applied by the Connecticut Supreme Court?

LIST OF PARTIES

The caption of the case contains the name of the petitioner, David A. Fernandes, Jr., and the prosecuting authority, the State of Connecticut.

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The Petitioner, David Fernandes, Jr., respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the Connecticut Supreme Court which entered in the above-entitled proceeding on January 5, 2011.

OPINION BELOW

The opinion below was from the Connecticut Supreme Court. It was published and filed on January 5, 2011. The case was styled *State of Connecticut v. David A. Fernandes, Jr.,* No. SC 18449. It is published as *State v. Fernandes*, 300 Conn. 104 (2011). The entire text of this opinion is reproduced in the appendix.

STATEMENT OF BASIS FOR JURISDICTION

The Connecticut Supreme Court entered judgment on January 5, 2011. On January 20, 2011, the petitioner filed a Motion for Reconsideration and Reargument. The Connecticut State Court denied the petitioner's motion on February 17, 2011. Jurisdiction of this court to review the judgment of the Connecticut Supreme Court on a writ of certiorari in this matter is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION

Article XIV of the Amendments to the Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUPREME COURT RULES

United States Supreme Court, Rule 10. Considerations Governing Review on Writ of Certiorari:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in con•ict with the decision of another United States court of appeals on the same important matter;

has decided an important federal question in a way that con•icts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

STATUTES

Connecticut General Statutes:

Sec. 46b-127. Transfer of child charged with a felony to the regular criminal docket. Transfer of youth age sixteen to docket for juvenile matters. (a) The court shall automatically transfer from the docket for juvenile matters to the regular criminal docket of the Superior Court the case of any child charged with the commission of a capital felony, a class A or B felony or a violation of section 53a-54d, provided such offense was committed after such child attained the age of fourteen years and counsel has

been appointed for such child if such child is indigent. Such counsel may appear with the child but shall not be permitted to make any argument or file any motion in opposition to the transfer. The child shall be arraigned in the regular criminal docket of the Superior Court at the next court date following such transfer, provided any proceedings held prior to the finalization of such transfer shall be private and shall be conducted in such parts of the courthouse or the building wherein court is located as shall be separate and apart from the other parts of the court which are then being held for proceedings pertaining to adults charged with crimes. The file of any case so transferred shall remain sealed until the end of the tenth working day following such arraignment unless the state's attorney has filed a motion pursuant to this subsection, in which case such file shall remain sealed until the court makes a decision on the motion. A state's attorney may, not later than ten working days after such arraignment, file a motion to transfer the case of any child charged with the commission of a class B felony or a violation of subdivision (2) of subsection (a) of section 53a-70 to the docket for juvenile matters for proceedings in accordance with the provisions of this chapter. The court sitting for the regular criminal docket shall, after hearing and not later than ten working days after the filing of such motion, decide such motion.

(b) Upon motion of a juvenile prosecutor and order of the court, the case of any child charged with the commission of a class C or D felony or an

unclassified felony shall be transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court, provided such offense was committed after such child attained the age of fourteen years and the court finds ex parte that there is probable cause to believe the child has committed the act for which he is charged. The file of any case so transferred shall remain sealed until such time as the court sitting for the regular criminal docket accepts such transfer. The court sitting for the regular criminal docket may return any such case to the docket for juvenile matters not later than ten working days after the date of the transfer for proceedings in accordance with the provisions of this chapter. The child shall be arraigned in the regular criminal docket of the Superior Court by the next court date following such transfer, provided any proceedings held prior to the finalization of such transfer shall be private and shall be conducted in such parts of the courthouse or the building wherein court is located as shall be separate and apart from the other parts of the court which are then being held for proceedings pertaining to adults charged with crimes.

Sec. 53a-8. Criminal liability for acts of another. (a) A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

Sec. 53a-60. Assault in the second degree: Class D felony. (a) A person is guilty of assault in the second degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person . . .

United States Code:

28 U.S.C. § 1257. State courts; certiorari. (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

A. Introduction

The Petitioner, David A. Fernandes, Jr., was charged on September 12, 2005 with conspiracy to commit assault in the second degree in violation of sections 53a-48 and 53a-60 of the Connecticut General Statutes. The charge was a class D felony, a less serious category than class A, class B or class C

felonies under the Connecticut felony statutory structure. At the time of his arrest, Mr. Fernandes was 15 years of age and had never been previously arrested. He was initially summoned to juvenile court in September of 2005. On November 11, 2005 and November 17, 2005, pursuant to Conn. Gen. Stat. § 46b-127(b) and over his objection the case was transferred from juvenile court to the adult criminal court. In April of 2007, the then 17 year old petitioner was tried as an adult and convicted by a jury of assault in the second degree as an accessory. In June 2007, he was sentenced by the trial court to a term of incarceration of three years, execution suspended after one year of incarceration, with probation of three years.

The Petitioner appealed the judgment to the Connecticut Appellate Court, which reversed the conviction, holding that due process required a hearing in juvenile court to determine whether the case should be transferred to adult criminal court. On certified appeal by the State of Connecticut, on January 5, 2011, the Connecticut Supreme Court, in a split decision, reversed the Connecticut Appellate Court's decision. (App. p. 1.)

B. Facts Relevant To This Petition

The following facts are summarized in the Connecticut Supreme Court opinion (internal citations omitted):

On September 12, 2005, the defendant was issued a juvenile summons and complaint/promise to appear on a charge of conspiracy to commit assault in the second degree in violation of General Statutes §§ 53a-486 and 53a-60. The charge stemmed from an incident at the defendant's school on September 1, 2005. The defendant's date of birth is April 4, 1990, making him fifteen years old at the time of the incident. The defendant appeared in juvenile court on September 16, 2005, with counsel, and probable cause for the charge was found. On the defendant's November 11, 2005 appearance in juvenile court, the case was transferred to the criminal docket pursuant to . . . § 46b-127(b). No hearing was held in juvenile court to consider the propriety of the defendant's transfer.

The state, by substitute information, charged the defendant additionally with assault in the second degree as an accessory in violation of . . . §§ 53a-8 and 53a-60(a)(1). The defendant's jury trial [as an adult] commenced in April, 2007. The jury found the defendant guilty of assault in the second degree as an accessory, and found him not guilty of conspiracy to commit assault in the second degree. On June 1, 2007, the court sentenced the defendant to a total effective term of three years incarceration, execution suspended after one year, with three years probation.

The defendant subsequently appealed from the judgment of conviction to the Appellate

> Court. The Appellate Court reversed the defendant's conviction and remanded the case for unspecified further proceedings, concluding that "[d]ue process and § 46b-127(b) require that the defendant be afforded a hearing in which the [j]uvenile [c]ourt judge considers argument from counsel as to whether a case should be transferred to adult criminal court."

State v. Fernandes, 300 Conn. 104, 108-110 (2011). (App. pp. 6-7.)

In reaching its conclusion, the Connecticut Appellate Court reasoned that since Connecticut's statutes vested original jurisdiction over children charged with class C, class D and unclassified felonies in juvenile court, a liberty interest in proceeding with the case in juvenile court was created. *State v. Fernandes*, 115 Conn. App. 180, 188 (2009). It relied on the Connecticut Supreme Court's decision of *State v. Angel C.*, 245 Conn. 93 (1998) which relied on this Court's decision in *Kent v. United States*, 383 U.S. 541 (1996). The Appellate Court held that the liberty interest could not be taken away without a due process hearing. *Id.* It relied on the Connecticut Supreme Court's decision of *State v. Angel C.*, 245 Conn. 93 (1998). The first sentence of Connecticut General Statute § 46b-127(b) does not specify that transfer to adult court is contingent on there being a due process hearing. It states:

> Upon motion of a prosecutorial official and order of the court, the case of any child

> charged with the commission of a class C or D felony or an unclassified felony shall be transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court, provided such offense was committed after such child attained the age of fourteen years and the court finds ex parte that there is probable cause to believe the child has committed the act for which he is charged.

Id. Unable to ascertain the scope of the statute from its text and its relationship with surrounding statutes, the court then analyzed the legislative history behind § 46b-127. *Id.* Connecticut's intermediate appellate court interpreted statements made by state Representative Dale W. Radcliffe to mean that the statute was intended to give juvenile courts discretion over transferring cases to the criminal docket. *Id.* at 187. (App. pp. 59-60.)

In a 4-2 decision, the Connecticut Supreme Court reversed the Connecticut Appellate Court's decision, holding that "§ 46b-127(b) does not entitle the defendant to a hearing in the juvenile court prior to the initiation of a transfer to contest the appropriateness of trying the juvenile as an adult." *Fernandes*, 300 Conn. 104 at 111. The Connecticut Supreme Court held that the statute creates a liberty interest in juvenile status and that a hearing must be held before that status can be removed in a transfer to adult criminal court. *Id.* Although the Connecticut Supreme Court agreed with the lower court's essential constitutional holding that due process does

require that a hearing occur before a transfer is fully effected, it held that the transfer hearing must be held in the adult criminal court and cannot be held in juvenile court. *Id.*

At the beginning of its analysis, the court addressed a threshold question: "whether, upon the discretionary motion of a prosecutor and the court's finding of probable cause, the juvenile court must issue the order described by § 46b-127(b)." *Id.* at 113. (App. p. 12.) The phrase "order of the court" was determined to be ambiguous – that it could mean one of two things: (1) that upon a finding of probable cause and a motion by the prosecutor for transfer, the court must transfer the case, or (2) that the juvenile court has the discretion to decide whether to transfer the case. *Id.* at 114. Relying on language in the statute that says the criminal court may within a limited period of time return a case to the juvenile court after it is transferred, the Connecticut Supreme Court read the statute to mean that because such discretion is vested only in the adult criminal court and because the statute does not provide for a hearing in juvenile court prior to transfer, due process hearings must be held at adult court. *Id.* at 115. The court also considered, as the Connecticut Appellate Court did, the related statutory provisions of transferring juveniles charged with more serious felonies. The Connecticut Supreme Court concluded that while "§ 46b-127(b) expressly requires only the juvenile court to consider whether there is probable cause that the child has committed the class C or class D felony charged,"

there is an ambiguity as to whether the section "contemplates" an opportunity for argument at a pre-transfer hearing because the statutory text omits mention of a "bar to argument prior to transfer similar to that in cases dealing with class A or class B felonies." *Id.* at 116. (App. p. 16.) Thus, the court turned to the statute's legislative history. The court focused on legislative debates on the passage of the statute and proposed amendments and recognized that class A and B felony charges are transferred automatically while class C, D and unclassified felonies are subject to a "motion by the prosecutor and the requisite findings." *Id.* at 120. Noting amendments to the statute in 1995 and 1997, the court opined that the statute does not require the juvenile court to allow argument by counsel against transfer, explaining:

> We note that the 1995 amendment did not include the provision in § 46b-127(a) expressly prohibiting argument in opposition to a transfer under § 46b-127(a). That language was added in 1997; see Public Acts 1997, No. 97-319, § 21; and there is no relevant legislative history. In light of the fact that the pre-1995 statute, which provided for transfer of only specific serious felonies, expressly provided detailed hearing procedures to challenge that transfer, it appears that the legislature in 1997 simply intended to make express its intent to eliminate the previously existing procedural protections. Its decision not to preclude expressly in § 46b-127(b) argument in opposition to transfer could mean

> either that the legislature deemed it unnecessary to address protections that never existed for class C and D felonies or that the legislature intended to leave open the possibility that the juvenile's counsel could oppose the transfer once it was under consideration by the criminal court.

Id. at 121-22. (App. at p. 23.)

The majority opinion interpreted the statute to mean that after a motion by the juvenile prosecutor and "a determination by the juvenile court that there is probable cause that the child committed the felony offense charged," the defendant is entitled to a due process hearing in adult criminal court before the case is accepted onto the criminal docket. *Id.* at 128. (App. at p. 31.)

The dissenting opinion reflects a different, competing interpretation. After applying the same tools of statutory construction, the dissent found "that the language of the statute and its legislative history reveal *that the legislature intended to provide juveniles with an opportunity to contest their transfer at a hearing in the juvenile court.*" *Id.* at 130 (J. Eveleigh dissenting, emphasis added, App. p. 34.) The dissent found that the phrase "order of the court" demonstrates that the legislature intended that the transfer decision be made by the juvenile court. *Id.* at 133. The dissent found that the word "order" is defined by Black's Law Dictionary to mean a "mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of

the merits, but adjudicating a preliminary point or directing some step in the proceedings." *Id.* (App. p. 39.) The dissent further reasoned that since § 46b-127(b) did not contain language similar to § 46b-127(a) which expressly provided for a mandatory transfer to the criminal court, the legislature intended that the juvenile court have a degree of discretion in transferring cases. *Id.* at 134-35. (App. pp. 39-40.) Turning to the statute's legislative history, the dissent interpreted the comments made by state representative Lawlor and cited by the majority to mean that the juvenile court would retain "ultimate discretion over whether to order the transfer." *Id.* at 138. (App. p. 45.) Moreover, the dissent found that the legislature rejected attempts by representatives to amend the statute to make the transfers under § 46b-127 automatic upon the filing of a motion by the prosecutor. *Id.* at 140. (App. p. 47.) The original statute, passed in 1995, contained the language "upon motion of a juvenile prosecutor and approval by the court, the case of any child charged with the commission of a class C or D felony or an unclassified felony shall be transferred." *Id.* Again turning to the dictionary, the dissent followed a definition of "approval" as "the act of approving" which is "to judge and find commendable or acceptable." *Id.* at 141. (App. p. 48.) Thus, by analyzing that language, the dissent decided that the legislature intended the "juvenile court to have the discretion to determine whether transfer was appropriate." *Id.* (App. p. 48.) This competing interpretation makes logical definitional sense.

David Fernandes is now twenty-one years old. He has been free on bond since he was convicted on June 1, 2007. He filed the Motion for Reconsideration and Rehearing before the Connecticut Supreme Court on January 20, 2011. In this motion the petitioner argued, in part, "[if] indeed the legislative debate *itself* is ambiguous . . . reconsideration is warranted so the constitutional rule of lenity may be applied." (Motion for Reconsideration and Rehearing, January 20, 2011, p. 5, App. p. 70.) The motion was denied on February 17, 2011. (App. p. 63.)

REASONS FOR GRANTING THE PETITION

Summary Of The Argument

A. The Connecticut Supreme Court committed constitutional error when it failed to apply the rule of lenity and hold that the constitutionally required due process hearing occur at juvenile court and not at adult court. Under the strict "grievous ambiguity or uncertainty" standard, the decision of the Connecticut Supreme Court conflicts with *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) and *Chapman v. United States*, 500 U.S. 453, 463 (1991). Certiorari should be granted to correct this error of the Connecticut Supreme Court.

B. The rule of lenity should apply to all ambiguous penal statutes and not be restricted to those that are grievously ambiguous or uncertain. Applying a standard that does not require statutory ambiguity

to be "grievous" comports with the rule of lenity standard articulated in *United States v. Granderson*, 511 U.S. 39, 54 (1994). Certification should be granted to clarify and harmonize the current conflicting lines of precedent by removing the "grievousness" predicate described in *Muscarello v. United States*, 524 U.S. 125, 139 (1998), *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) and in *Chapman v. United States*, 500 U.S. 453, 463 (1991).

ARGUMENT

A. The Connecticut Supreme Court Erred By Not Applying The Rule Of Lenity In Interpreting Connecticut General Statute § 46b-127(b).

Rooted in due process, the rule of lenity provides that ambiguities in criminal statutes are to be resolved in favor of the defendant. This Court has noted

> When interpreting a criminal statute, we do not play the part of a mind reader. In our seminal rule-of-lenity decision, Chief Justice Marshall rejected the impulse to speculate regarding a dubious congressional intent. "[P]robability is not a guide which a court, in construing a penal statute, can safely take." *United States v. Wiltberger*, 5 Wheat. 76, 105 (1820). And Justice Frankfurter, writing for the Court in another case, said the following: "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in

> favor of lenity." *Bell v. United States*, 349 U.S. 81, 83 (1955).

United States v. Santos, 128 S. Ct. 2020 at 2026 (2008).

In a sense, the Connecticut Supreme Court did end up playing "the part of a mind reader." In footnote 12 the majority opinion states:

> The Appellate Court relied on comments by one legislator who was not a sponsor of the bill without apparently considering or giving due effect to the responses to those statements and earlier statements by the bill's sponsor, Representative Lawlor. See *State v. Fernandes*, supra, 115 Conn. App. 180. *In our view, this particular exchange is ambiguous*, and is particularly unclear as to whether the procedures at issue concerned the juvenile court or the criminal court.

State v. Fernandes, 300 Conn. 104 at 120 (2011) (App. pp. 21-22, emphasis added.)

Based on this judicial admission it is clear that ambiguity remained even after the Connecticut Supreme Court analyzed the statute's context and legislative history. Applying the principles of lenity, the interpretation that a transfer hearing be held in juvenile court should have been adopted because it was reasonable and such a construction favored the defendant.[1] Instead, the state court interpreted the

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[1] Apart from the fact that such sensitive hearings should be conducted at the court where the judicial officers and attorneys

(Continued on following page)

statute against the principles of lenity when it used a definition of the phrase "order of the court" that turned the statute against the defendant.

Statutory ambiguity is the basis for the rule of lenity. *Bifulco v. United States*, 447 U.S. 381, 387 (1980). The rule is not applied by a court unless "a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history and motivating policies of the statute." *State v. Lutters*, 270 Conn. 198, 219 (2004) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)). That is what happened here, but Connecticut's highest court did not apply the rule. A statute is ambiguous when "it yields more than one reasonable interpretation after a [court has applied] all of [its] tools of construction." *In re William D.*, 284 Conn. 305, 320 (2007). Doubts "concerning the ambit of criminal statutes" are to be resolved in "favor of lenity." *Dunn v. United States*, 442 U.S. 100, 112 (1979). Lenity means that courts do not interpret criminal statutes in a manner that increases the

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have the specialized training and experience to address juveniles and juvenile justice issues, having the hearing at juvenile court favored the defendant because then his conviction would have remained vacated in accordance with the Connecticut Appellate Court's decision. By holding that such due process hearings must occur at adult court, Connecticut's highest court reinstated the petitioner's conviction. For reasons unknown, the underlying defendant's appellate counsel voluntarily waived arguing that the due process hearing be held at either juvenile or adult court. See *State v. Fernandes*, 300 Conn. 104 n.19 (2001).

penalties they impose when such interpretations can be based on no more than conjecture as to the legislature's intent. *Bifulco*, 447 U.S. 381 at 387. Conjecture and probabilities should not be employed in deciding statutory intent.

Lenity applies to the definitions of individual terms and phrases within a statute. In *Dunn v. United States*, supra, the case turned on the definition of the term "ancillary proceedings," which was used in the Organized Crime Control Act of 1970, 18 U.S.C. § 1623, but not defined there or anywhere else in the criminal code. 442 U.S. 100 at 101-02. The defendant in that case was charged with making false statements when he admitted in an interview with another person's attorney that he had given false testimony in the grand jury proceedings that indicted the client. *Id.* at 103. The Government argued that the interview with the attorney was a "proceeding ancillary to a federal court proceeding," putting it within the scope of the statute. After considering the context of the statute and its legislative history, this Court rejected that contention, holding that the statute's language and history suggested that Congress did not intend for it to apply to events less formal than a deposition. *Id.* at 111. Characterizing an interview with an attorney at his office as an ancillary proceeding "would not only take liberties with the language and legislative history of § 1623, it would also contravene this Court's long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity." *Id.* at 112.

Just as *Dunn* pivoted on the definition of the term "ancillary proceedings," this case turns on the definition of the phrase "order of the court." Because no reference to a hearing is found in the language of § 46b-127(b), the Court created a hearing requirement through the use of corrective judicial gloss. It then analyzed what the statute did say regarding the role of the juvenile court and the role of the adult court. A case would be transferred to criminal court after a motion by the prosecutor and an order of the juvenile court. C.G.S. § 46b-127(b). A case could be returned to juvenile court by unilateral action of the criminal court. (See C.G.S. § 46b-127(b).) The interpretation of "order of the court" that is favorable to the defendant – that the juvenile court has discretion to transfer a case to criminal court and is not simply acting in a ministerial capacity – is logical and reasonable. In addition to being the interpretation of the Connecticut Appellate Court and the dissenting justices of the Connecticut Supreme Court, common usage favors such a reading. The text of § 46b-127(b) does not contain explicit language limiting the term "order" to an action that carries no discretion, i.e that the juvenile court must automatically transfer a case upon a motion by a prosecutor. Nor does the statute say that upon a motion by a prosecutor, the case "shall" be transferred to criminal court. Instead, the statute uses the phrase "order of the court," suggesting that a transfer to adult court is predicated on a judicial decision. The majority of the Connecticut Supreme Court itself said that the phrase "order of the court" could mean either that the juvenile court

must transfer the case upon a motion by a prosecutor, or that the juvenile court has discretion in deciding whether to transfer the case. The majority's reasoning that "order of the court" does not refer to a discretionary power of the court is apparently based on the idea that because it would be duplicative to vest transfer discretion in both juvenile and adult courts, it is better to limit such discretion to one court. Such an idea was not inferred from any statutory language apart from the fact that the adult court has statutory discretion within a 10 day period to send a case back to juvenile court. (C.G.S. § 46b-127(b).) It appears that the Connecticut Supreme Court did not consider whether the legislature intended a system in which *both* courts would have transfer discretion, i.e. the juvenile court having discretionary power to initially decide whether a case should be transferred to adult court and, once at adult court, the adult court having the further discretion to send it back within 10 days as a fail-safe mechanism to prevent improvidently ordered transfers. Utilizing a textual analysis, the phrase "order of the court" and the intended venue for juvenile transfer hearings remained ambiguous even after the text of § 46b-126(b) and other statutes were analyzed.

Analyzing the statute's legislative history did not solve the ambiguity problem either. As the majority noted, the word "order" was inserted into the statute in place of the word "approval" in 1998. The majority further noted that the change in wording did not reflect a change in the statute's meaning. *Fernandes*,

300 Conn. 104, n.11. Although the majority further opined that the legislature considered amendments that would have inserted more automatic language into the section, it was unable to determine why those amendments were rejected. *Id.* In addition, Representative Lawlor's statements regarding the statute are inconclusive in determining the legislature's intent. While both the majority and dissent considered an exchange between Representatives Lawlor and Radcliffe, the majority stated that the exchange was ambiguous. *State v. David Fernandes, Jr.*, 300 Conn. 104 at 120. The majority further asserted that statements by Representative Prelli, cited by the dissent to refute the majority's interpretation of Representative Lawlor's comments, were not weighed any more heavily than those in the Lawlor-Radcliffe exchange. *Id.* at n.12. The only conclusion that can be drawn from analyzing the sketchy legislative history of proposed and rejected amendments and inconclusive comments by various legislators is that the legislative history simply does not reveal the clear intent behind the statute and the Connecticut Supreme Court conjectured. The majority itself, when referring to the statute's 1997 amendments, stated only that "it appears" the legislature "intended to make express its intent to eliminate the previously existing procedural protections." 300 Conn. 104 at 121. The majority further noted that because the legislature did not preclude argument against transfers "could mean either that the legislature deemed it unnecessary to address protections that never existed for class C and D felonies or that the legislature

intended to leave open the possibility that the juvenile's counsel could oppose the transfer once it was under consideration by the criminal court." *Id.* at 121-22. This language of the majority opinion shows that the legislative history analysis still left one speculating regarding what was intended. Thus, the rule of lenity should have applied.

> The rule of lenity applies only if, "after seizing everything from which aid can be derived," . . . we can make "no more than a guess as to what Congress intended." *United States v. Wells*, 519 U.S. 482, 499 (1997) (quoting *Reno v. Koray*, 178 (1958). To invoke the rule, we must conclude that there is a "'grievous ambiguity or uncertainty' in the statute." *Staples v. United States*, 511 U.S. 600, 619, n.17 (1994) (quoting *Chapman v. United States*, 500 U.S. 453, 463 (1991).

Muscarello v. United States, 524 U.S. 125 at 125 (1998).

By applying "judicial gloss" to rescue Connecticut General Statute Section 46b-127(b) from its facial unconstitutionality by requiring due process hearings at adult court, Connecticut's highest court unfortunately glossed over the "grievous ambiguity or uncertainty in the statute." (*Id.*) Doing so was constitutional error under the *Staples*, *Chapman* and *Muscarello* line of cases. Hence, certiorari should be ordered granted.

B. The Rule Of Lenity Should Apply To All Ambiguous Penal Statutes And Not Be Restricted To Those That Are Grievously Ambiguous Or Uncertain. The Connecticut Supreme Court Erred When It Did Not Apply The *Granderson* Court's Rule Of Lenity.

The petitioner was not afforded a due process hearing in either the juvenile or the adult court. Having been deprived of a due process hearing in either court, the intermediate appellate court concluded with definitude that the due process hearing had to occur at the source point of the transfer, the juvenile court, and thus reversed the petitioner's felony conviction. Connecticut's highest appellate court concluded with definitude that the due process hearing had to occur at the adult court and thus reinstated the felony conviction. Assuming arguendo that the obvious and inherent ambiguity in the legislators' intent (manifested by the two different state appellate decisions and explained in the preceding argument) did not rise to the level of "grievous ambiguity or uncertainty," then certiorari should be granted so that this strict standard is lessened to the one this Court utilized in *United States v. Granderson*, 511 U.S. 39 (1994). In *Granderson*, this Court stated: "where text, structure, and history fail to establish that the Government's position is unambiguously correct – we apply the rule of lenity and resolve the ambiguity in [defendant's] favor." *Id.*, at 54. In the case at bar, there simply is no way that the State of Connecticut's position is "unambiguously correct" and under this less restrictive standard, the

rule of lenity requires that the due process hearing be held at juvenile court.

There are two lines of cases which have been developed by this Court. One is the "grievous ambiguity or uncertainty" line of cases, as is described in *Muscarello v. United States*, 524 U.S. 125, 139 (1998), *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) and *Chapman v. United States*, 500 U.S. 453, 463 (1991). The other is described in the less restrictive *Granderson* line of cases. This other line of precedent far better serves lenity's "purpose of enhancing criminal law's democratic responsiveness." Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L. Rev. 885 at 922 (2004). This less restrictive standard is doctrinally consistent with the original rule of strict construction described in *United States v. Wiltberger*, 18 U.S. 76 (1820). The *Granderson* line of precedent is reflected in *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) and *United States v. R.L.C.*, 503 U.S. 291, 305 (1992).

The petitioner is not arguing that the rule of lenity precludes courts from interpreting legislative history in order to attempt to resolve blatant textual ambiguity of a statute. In Justice Scalia's concurring opinion in *United States v. R.L.C.*, 503 U.S. 291 at 308 (1992), it was noted that, "it is not consistent with the rule of lenity to construe a textually ambiguous statute against a criminal defendant on the basis of legislative history." Although the petitioner agrees, this more controversial position, which forecloses all legislative history analysis, is not the petitioner's

argument here. Here, the petitioner's argument is that there is doctrinal tension between two lines of United States Supreme Court precedent and the better approach merely requires ambiguity, not grievous ambiguity, as the prerequisite to applying the rule of lenity. This doctrinal tension seems to recur with some regularity. For example, in *United States v. Hayes*, 555 U.S. ___ (2009) the majority noted that the statute in question was "not a model of the careful drafter's art" but because there was no grievous ambiguity, the rule of lenity was not applied. *Id.* at 3. In his dissent, Chief Justice Roberts stated:

> Taking a fair view, the text of § 921(a)(33)(A) is ambiguous, the structure leans in the defendant's favor, the purpose leans in the Government's favor, and the legislative history does not amount to much. This is a textbook case for application of the rule of lenity. *If the rule of lenity means anything, it is that an individual should not go to jail for failing to . . . comb through obscure legislative history.*

Id. at 8 (emphasis added).

This dissenting opinion makes no mention of "grievous ambiguity." Another example of this unresolved doctrinal tension is found in a decision from last year, *Barber v. Thomas*, 560 U.S. ___ (2010). The phrase being interpreted was "term of imprisonment" under 18 U.S.C. § 3624(b). The majority opinion held, "[h]aving so considered the statute, we do not believe that there remains a 'grievous ambiguity or uncertainty' in the statutory provision before us." *Id.* at 14.

Justices Kennedy, Stevens and Ginsberg dissented. The dissent opined that:

> The Court's reading of §3624(b)(1), therefore, is less consistent with the text than the reading explained above. But even if these interpretations were in equipoise, under any fair application the rule of lenity should tip the balance in petitioner's favor. When a penal statute is susceptible of two interpretations, the one more favorable to the defendant must be chosen unless "text, structure, and history . . . establish that the [harsher] position is unambiguously correct."

United States v. Granderson, 511 U.S. 39, 54 (1994).

In the case at bar, the "harsher position" is not unambiguously correct and under the *Granderson* line of precedent, the rule of lenity should be applied so that Connecticut's juvenile transfer statute requires that a due process hearing occur in juvenile court. Doing so would effectively reinstate the decision of the Connecticut Appellate Court and vacate the petitioner's felony conviction. *Fernandes,* 115 Conn. App. 180 (2009).

CONCLUSION

There should not be two lines of rule-of-lenity case law. The petitioner argues that under the stricter line of precedent which requires finding "grievous ambiguity" after legislative history and debate is

analyzed, Connecticut's juvenile transfer statute was, in fact, grievously ambiguous regarding which court the state legislature intended the due process hearing to occur at. Thus, the petitioner should have been given the benefit of the ambiguity. Therefore, the Connecticut Supreme Court, which actually acknowledged the ambiguous nature of some of the legislators' remarks, should have applied the rule of lenity and held, as the Connecticut Appellate Court held, that the petitioner's due process hearing should have occurred at the juvenile court. The petitioner's felony conviction would then have remained vacated. In holding otherwise, the Connecticut Supreme Court attempted to discern the true intent of the few legislators who briefly spoke about the statute prior to its passage in 1995 and then declared that these sensitive transfer hearings can only be held at adult criminal court based on this discernment. Ironically, the Connecticut Appellate Court justices looked at the same legislative debate and discerned with similar definitude that the legislative intent revealed that these hearings could only be held at juvenile court.

If the statute was not "grievously ambiguous" it was assuredly ambiguous. The other line of precedent merely requires ambiguity. If legislative intent is not unambiguously expressed then "the tie must go to the defendant." *Santos*, supra, 128 S. Ct. at 2025. That did not happen here. Unfortunately, discerning intent from sketchy legislative history to resolve textual ambiguity in criminal statutes may lead to arbitrary looking decisions, especially when the bar of ambiguity

is set too high. If certiorari is granted, then this Court could restore the rule of lenity to its proper place in American constitutional law and avoid having it atrophy into little more than a "historical curiosity." *Halloway v. United States*, 526 U.S. 1 at 21 (1999). (Scalia, J. dissenting.) For this reason, certiorari should be granted.

Respectfully submitted,

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SUPREME COURT

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.*
DAVID A. FERNANDES, JR.
(SC 18449)

Rogers, C. J., and Norcott, Katz, Palmer, Eveleigh and Vertefeuille, Js.

*Argued October 25, 2010 – officially released January 5, 2011**

James M. Ralls, senior assistant state's attorney, with whom, on the brief, were, *Michael Regan,* state's attorney, and *David J. Smith,* senior assistant state's attorney, for the appellant (state).

Ralph U. Bergman, for the appellee (defendant).

Marsha L. Levick filed a brief for the Center for Children's Advocacy et al. as amici curiae.

Christine Perra Rapillo and D. Keith Foren filed a brief for the office of the chief public defender as amicus curiae.

Opinion

KATZ, J. The state appeals, following our grant of its petition for certification, from the judgment

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* January 5, 2011, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

of the Appellate Court reversing the trial court's judgment, rendered after a jury trial, convicting the defendant, David A. Fernandes, Jr., of one count of assault in the second degree as an accessory, a class D felony, in violation of General Statutes §§ 53a-8(a)[1] and 53a-60(a)(1)[2] following the transfer of his case from the juvenile docket to the regular criminal docket of the Superior Court (criminal court)[3] pursuant to General Statutes (Rev. to 2005)

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[1] General Statutes § 53a-8(a) provides: "A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

[2] General Statutes § 53a-60(a) provides in relevant part: "A person is guilty of assault in the second degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person. . . ."

[3] "This state has a unified court system. Thus, all criminal and civil matters, including juvenile matters, fall within the subject matter jurisdiction of the Superior Court. Juvenile matters are comprised of a civil session and a criminal session; all proceedings concerning delinquent children are heard in the criminal session for juvenile matters. General Statutes § 46b-121(a). For ease of reference, we refer to the Superior Court for juvenile matters as juvenile court and to the Superior Court for regular, or adult, criminal matters as criminal court." *State* v. *Ledbetter,* 263 Conn. 1, 4-5 n.9, 818 A.2d 1 (2003). We further note that, because of this unified system, "[r]ather than implicating subject matter jurisdiction, issues relating to transfers between the juvenile and the regular criminal docket involve considerations that are analogous to those of the law of venue." *State* v. *Kelley,* 206 Conn. 323, 332, 537 A.2d 483 (1988); accord *In re Matthew F.,* 297 Conn. 673, 691, 4 A.3d 248 (2010). "We

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§ 46b-127(b).[4] The issue in this certified appeal is whether the failure to provide a hearing in the juvenile

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refer to the concept of the rights that arise upon the commitment of a case to the juvenile docket in terms of jurisdiction vesting in the juvenile court for the sake of convenience. . . . This should not be viewed, however, in any way as a retreat from our conclusion or rationale in *Kelley*." *State* v. *Angel C.*, 245 Conn. 93, 108 n.17, 715 A.2d 642 (1998). Accordingly, to the extent that the defendant's arguments are predicated on a change in jurisdiction upon transfer, there is no basis for such a claim.

[4] General Statutes (Rev. to 2005) § 46b-127 provides: "(a) The court shall automatically transfer from the docket for juvenile matters to the regular criminal docket of the Superior Court the case of any child charged with the commission of a capital felony, a class A or class B felony or a violation of section 53a-54d, provided such offense was committed after such child attained the age of fourteen years and counsel has been appointed for such child if such child is indigent. Such counsel may appear with the child but shall not be permitted to make any argument or file any motion in opposition to the transfer. The child shall be arraigned in the regular criminal docket of the Superior Court at the next court date following such transfer, provided any proceedings held prior to the finalization of such transfer shall be private and shall be conducted in such parts of the courthouse or the building wherein court is located as shall be separate and apart from the other parts of the court which are then being held for proceedings pertaining to adults charged with crimes. The file of any case so transferred shall remain sealed until the end of the tenth working day following such arraignment unless the state's attorney has filed a motion pursuant to this subsection, in which case such file shall remain sealed until the court makes a decision on the motion. A state's attorney may, not later than ten working days after such arraignment, file a motion to transfer the case of any child charged with the commission of a class B felony or a violation of subdivision (2) of subsection (a) of section 53a-70 to the docket for juvenile matters for proceedings in accordance with the provisions of this chapter. The court sitting for the regular

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criminal docket shall, after hearing and not later than ten working days after the filing of such motion, decide such motion.

"(b) Upon motion of a juvenile prosecutor and order of the court, the case of any child charged with the commission of a class C or D felony or an unclassified felony shall be transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court, provided such offense was committed after such child attained the age of fourteen years and the court finds ex parte that there is probable cause to believe the child has committed the act for which he is charged. The file of any case so transferred shall remain sealed until such time as the court sitting for the regular criminal docket accepts such transfer. The court sitting for the regular criminal docket may return any such case to the docket for juvenile matters not later than ten working days after the date of the transfer for proceedings in accordance with the provisions of this chapter. The child shall be arraigned in the regular criminal docket of the Superior Court by the next court date following such transfer, provided any proceedings held prior to the finalization of such transfer shall be private and shall be conducted in such parts of the courthouse or the building wherein court is located as shall be separate and apart from the other parts of the court which are then being held for proceedings pertaining to adults charged with crimes.

"(c) Upon the effectuation of the transfer, such child shall stand trial and be sentenced, if convicted, as if he were sixteen years of age. Such child shall receive credit against any sentence imposed for time served in a juvenile facility prior to the effectuation of the transfer. A child who has been transferred may enter a guilty plea to a lesser offense if the court finds that such plea is made knowingly and voluntarily. Any child transferred to the regular criminal docket who pleads guilty to a lesser offense shall not resume his status as a juvenile regarding said offense. If the action is dismissed or nolled or if such child is found not guilty of the charge for which he was transferred or of any lesser included offenses, the child shall resume his status as a juvenile until he attains the age of sixteen years.

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court to afford the defendant an opportunity to contest his transfer violated the requirements of § 46b-127(b) and due process.[5] Because we agree with the state that the absence of a hearing in juvenile court

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"(d) Any child transferred to the regular criminal docket of the Superior Court who is detained shall be in the custody of the Commissioner of Correction upon the finalization of such transfer. A transfer shall be final (1) upon the expiration of ten working days after the arraignment if no motion has been filed by the state's attorney pursuant to subsection (a) of this section or, if such motion has been filed, upon the decision of the court to deny such motion, or (2) upon the court accepting the transfer pursuant to subsection (b) of this section. Any child returned to the docket for juvenile matters who is detained shall be in the custody of the Judicial Department.

"(e) The transfer of a child to a Department of Correction facility shall be limited to the provisions of subsection (d) of this section and said subsection shall not be construed to permit the transfer of or otherwise reduce or eliminate any other population of juveniles in detention or confinement within the Judicial Department or the Department of Children and Families."

Unless otherwise indicated, all references herein to § 46b-127 are to the 2005 revision.

[5] This court granted certification on the following issue: "Did the Appellate Court properly conclude that the transfer of the [defendant's] case from the juvenile docket to the regular docket of the Superior Court did not comply with the applicable statute and with due process requirements?" *State* v. *Fernandes*, 293 Conn. 917, 979 A.2d 491 (2009). As we explain later in this opinion, the Appellate Court's holding, as well as the defendant's claims on appeal, are limited to the proceedings before the juvenile court and do not extend to those before the criminal court. Because the certified question is stated more broadly than the appeal demands, we reframe it consistently with the issue before us. *See State* v. *Ouellette*, 295 Conn. 173, 183-85, 989 A.2d 1048 (2010).

did not violate statutory and due process requirements, we reverse the judgment of the Appellate Court.

The Appellate Court opinion recites the following facts and procedural history pertinent to the state's appeal. "On September 12, 2005, the defendant was issued a juvenile summons and complaint/promise to appear on a charge of conspiracy to commit assault in the second degree in violation of General Statutes §§ 53a-48[6] and 53a-60. The charge stemmed from an incident at the defendant's school on September 1, 2005. The defendant's date of birth is April 4, 1990, making him fifteen years old at the time of the incident. The defendant appeared in [j]uvenile [c]ourt on September 16, 2005, with counsel, and probable cause for the charge was found. On the defendant's November 11, 2005 appearance in [j]uvenile [c]ourt, the case was transferred to the criminal docket pursuant to . . . § 46b-127(b). [No hearing was held in juvenile

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[6] General Statutes § 53a-48 provides: "(a) A person shall be guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy.

"(b) It shall be a defense to a charge of conspiracy that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."

court to consider the propriety of the defendant's transfer.][7]

"The state, by substitute information, charged the defendant additionally with assault in the second degree as an accessory in violation of . . . §§ 53a-8 and 53a-60(a)(1). The defendant's jury trial [as an adult] commenced in April, 2007. The jury found the defendant guilty of assault in the second degree as an accessory, and found him not guilty of conspiracy to commit assault in the second degree. On June 1, 2007, the court sentenced the defendant to a total effective term of three years incarceration, execution suspended after one year, with three years probation." *State* v. *Fernandes*, 115 Conn. App. 180, 182-83, 971 A.2d 846 (2009).

The defendant subsequently appealed from the judgment of conviction to the Appellate Court. The Appellate Court reversed the defendant's conviction and remanded the case for unspecified further proceedings, concluding that "[d]ue process and § 46b-127(b) require that the defendant be afforded a hearing in which the [j]uvenile [c]ourt judge considers argument from counsel as to whether a case should be transferred to adult criminal court." *Id.*, 188. This certified appeal followed.

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[7] There is nothing in the record to indicate whether any hearing was held in criminal court, or whether the defendant's counsel requested such a hearing.

On appeal, the state claims that there is no statutory or constitutional right to a hearing in the juvenile court to challenge whether to transfer a juvenile to criminal court, and that due process concerns are satisfied by procedures in the criminal court. Specifically, the state claims that the statute does not provide for any hearing, and that due process would require a hearing with respect to only those matters on which § 46b-127(b) requires a court to make discretionary determinations. The state opines that, because the statute vests the juvenile court with authority to determine only whether the statutory predicates to transfer are satisfied – age, the offense charged, and probable cause – the defendant could have a due process right to a hearing regarding *those* determinations, but clearly would not have a right to a hearing to challenge the transfer if those statutory predicates were satisfied because the statute does not vest the juvenile court with any discretion to make such a determination.[8] Conversely,

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[8] This position, which the state advanced at oral argument in this court, constitutes a departure from the one taken in its brief, wherein the state had claimed that due process did not require *any* hearing in the juvenile court. We note that the state's position as to whether due process demands a hearing on the statutory predicates to initiation of the transfer process is neither an issue that we must resolve on appeal nor an issue on which such a "concession" can bind this court. It is the province of the court, not the parties through concessions, to determine what the constitution requires. Moreover, insofar as the state's position concerned a *constitutionally* required hearing, rather than a *statutorily* required one, we are puzzled by the dissent's

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the state contends that, because § 46b-127(b) does vest the criminal court with discretion to decide whether to retain or return a transferred juvenile file, a juvenile would be entitled to a due process right to a hearing before that court, and that a hearing addressing the appropriateness of such a transfer in juvenile court would be duplicative. In response, the defendant claims that he had a vested due process right to his juvenile status, and that he was deprived of that right without due process of law when he was denied the opportunity for a pretransfer hearing in juvenile court. Significantly, the defendant claims that only a pretransfer hearing in the juvenile court would satisfy due process. Indeed, he has expressly disavowed any claims regarding the proceedings before the criminal court. *See* footnote 19 of this opinion.

We conclude that § 46b-127(b) does not entitle the defendant to a hearing in the juvenile court prior to the initiation of a transfer to contest the appropriateness of trying the juvenile as an adult. Nevertheless, we conclude that § 46b-127(b) vests a juvenile potentially subject to transfer under that provision with a juvenile status that gives rise to a liberty interest. Accordingly, in keeping with the legislative directive vesting sole discretion over the transfer in the criminal court, we conclude that due process entitles such a juvenile to a hearing in criminal court

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reliance on the state's position as a starting point for the dissent's statutory interpretation.

prior to the finalization of his transfer. Therefore, the Appellate Court's judgment predicated on a statutory and due process right to a hearing in the juvenile court must be reversed.

Whether the Appellate Court properly concluded that the defendant's transfer did not comport with § 46b-127(b) and with the requirements of due process is a question of law, over which we exercise plenary review. *Ziotas* v. *Reardon Law Firm, P.C.*, 296 Conn. 579, 587, 997 A.2d 453 (2010). "Established wisdom counsels us to exercise self-restraint so as to eschew unnecessary determinations of constitutional questions." (Internal quotation marks omitted.) *State* v. *Lemon*, 248 Conn. 652, 663 n.15, 731 A.2d 271 (1999). Accordingly, we turn first to the question of whether § 46b-127(b) required that the defendant have a hearing in the juvenile court prior to his transfer to the criminal court.

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Hartford/Windsor Healthcare Properties, LLC* v. *Hartford*, 298 Conn. 191, 197, 3 A.3d 56 (2010).

As instructed by § 1-2z, we begin with the text of the statute itself. General Statutes (Rev. to 2005) § 46b-127(b) provides in relevant part: "Upon motion of a juvenile prosecutor and order of the court, the case of any child charged with the commission of a class C or D felony or an unclassified felony shall be transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court, provided such offense was committed after such child attained the age of fourteen years and the court finds ex parte that there is probable cause to believe the child has committed the act for which he is charged. . . . The court sitting for the regular criminal docket may return any such case to the docket for juvenile matters not later than ten working days after the date of the transfer for proceedings in accordance with the provisions of this chapter. . . ."

Section 46b-127(b) then establishes certain procedures to be followed before the court sitting for the regular criminal docket accepts and finalizes such a transfer. Specifically, "[t]he file of any case so transferred shall remain sealed until such time as the court sitting for the regular criminal docket accepts such transfer. . . . The child shall be arraigned in the regular criminal docket of the Superior Court by the next court date following such transfer, provided any proceedings held prior to the finalization of such transfer shall be private and shall be conducted in such parts of the courthouse or the building wherein court is located as shall be separate and apart from the other parts of the court which are then being held

for proceedings pertaining to adults charged with crimes." General Statutes (Rev. to 2005) § 46b-127(b).

It is self-evident that the statute makes no express reference to any hearing. Therefore, we examine its terms to determine whether such a hearing implicitly is required by the nature of the proceedings in the juvenile court. It is plain from the statute's text that transfer of a juvenile charged with a class C or class D felony is discretionary; the transfer takes place only "[u]pon motion of a juvenile prosecutor and order of the court"; General Statutes (Rev. to 2005) § 46b-127(b); provided that the court has made a finding of probable cause. This finding of probable cause is not limited to cases subject to transfer, but any case in which a juvenile has been charged with a criminal offense. *See* General Statutes §§ 46b-128(a) and 46b-133(d); Practice Book §§ 29-1 and 29-1A. Properly framed, therefore, the first question we must resolve is whether, upon the discretionary motion of a prosecutor and the court's finding of probable cause, the juvenile court must issue the order described by § 46b-127(b). If the court has no discretion as to whether to issue the transfer order, then there would be no basis upon which to infer that the statute would require a hearing.

Read in isolation, the portion of the statute that provides for these discretionary transfers does not answer this question. Although the provision lays out the requirements that must be satisfied before the order can be issued, the transfer itself is nevertheless conditioned upon that "order of the court. . . ."

General Statutes (Rev. to 2005) § 46b-127(b). As a result, this provision is susceptible to two competing interpretations: upon a finding of probable cause and a prosecutor's motion, the statute either *requires* the juvenile court to transfer the case, or vests the juvenile court with discretion to decide whether to transfer the case. Although the statute provides that a case "shall be transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court"; General Statutes (Rev. to 2005) § 46b-127(b); the presumptively mandatory language "shall"; *see Butts* v. *Bysiewicz,* 298 Conn. 665, 676, 5 A.3d 932 (2010); reasonably may refer to what happens to the case following an order, rather than create an obligatory duty on the juvenile court.

Viewing § 46b-127(b) in its entirety, however, the text supports the conclusion that the statute does not contemplate a hearing before a juvenile judge *prior* to transfer. The statute provides that, following the transfer of a case, the criminal court "may" return the case to the juvenile docket, which indicates that the criminal court has discretion over whether to retain or return any given transferred case. General Statutes (Rev. to 2005) § 46b-127(b). The discretionary term "may return" stands in sharp contrast to the "shall be transferred" language governing the initiation of the transfer in juvenile court. "[T]he use of the different terms . . . within the same statute suggests that the legislature acted with complete awareness of their different meanings . . . and that it intended the terms to have different meanings. . . ." (Internal

quotation marks omitted.) *Hasselt* v. *Lufthansa German Airlines*, 262 Conn. 416, 426, 815 A.2d 94 (2003). That the criminal court has discretion whether to retain the case is confirmed by the fact that, prior to the case being accepted on the regular docket, § 46b-127(b) prescribes extensive protections to ensure the continued confidentiality and privacy of the transferred juvenile. If the criminal court did not have discretion to return the case to the juvenile docket, such protections would be unnecessary as they would cease automatically upon acceptance of the transfer. Indeed, the statute's references to the power to accept a transfer, and to the "finalization" of a transfer, further underscore the discretionary nature of the criminal court's decision as to the ultimate destination of a transferred case. *See* General Statutes (Rev. to 2005) § 46b-127(b). Therefore, although the statute does not provide any guidelines or articulate standards for the criminal court to consider, it clearly contemplates a discretionary decision by that court whether to retain the case.

Additionally, the use of the discretionary term "may" in connection with the decision whether to return the case to the juvenile docket, when contrasted to the mandatory language governing the initiation of the transfer, suggests that the legislature did not intend for there to be a hearing prior to the juvenile court's transfer of a case. This conclusion is bolstered by the fact that an interpretation of § 46b-127(b) requiring a pretransfer hearing before the juvenile court would vest discretion in a court that would be

duplicative of the discretion exercised by the criminal court in deciding whether to retain or return any given transferred case before the adult court. As we previously have noted, such duplication in both juvenile and adult court regarding the same transferred case is unwarranted. *See In re Ralph M.*, 211 Conn. 289, 307, 559 A.2d 179 (1989) (concluding under earlier revision of § 46b-127 that duplicative probable cause hearings in juvenile court and criminal court are "unwarranted"). In addition to this potential duplication, granting discretion to the juvenile court to deny a transfer would give rise to the possible scenario wherein a criminal court, in its discretion, returned a transferred case to a juvenile court that, in its discretion, had approved that same transfer. We read the statute in a manner so as to avoid the possibility of such contradictory rulings. Therefore, it would appear that the "order of the court" language in § 46b-127(b) simply refers to the juvenile court's ministerial act of directing the transfer after making the requisite probable cause finding.[9]

In considering the question before us, however, § 1-2z also directs us to consider related provisions. As the Appellate Court properly noted, the juvenile

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[9] In light of the statutory predicates to transfer, such a determination necessarily would require the juvenile court to consider not only whether the state has alleged sufficient facts to support a finding of probable cause that the juvenile committed the crime charged, but also whether the statutory criteria relating to age and the type of felony are satisfied.

transfer statute distinguishes between the treatment of a child charged with the most serious offenses (capital felony, class A or class B felonies), and less serious felonies (class C, class D or unclassified felonies), respectively; General Statutes (Rev. to 2005) § 46b-127(a) and (b). "[S]ubsection (a) expressly declares that the transfer is automatic and that counsel for the child shall not be permitted to make any argument or file any motion in opposition to the transfer. . . . No equivalent [prohibitory] language exists in subsection (b). Instead, subsection (b) provides that the case shall be transferred only [u]pon motion of a juvenile prosecutor and order of the court." (Citation omitted; internal quotation marks omitted.) *State* v. *Fernandes, supra*, 115 Conn. App. 186-87. We conclude that, although the text of § 46b-127(b) expressly requires only the juvenile court to consider whether there is probable cause that the child has committed the class C or class D felony charged, the omission of a bar to argument prior to transfer similar to that in cases dealing with class A or class B felonies raises an ambiguity as to whether § 46b-127(b) contemplates an opportunity for such argument at a pretransfer hearing before the juvenile court. Accordingly, as instructed by § 1-2z, we turn to extratextual sources to aid in our interpretation of the statute.

The genealogy and legislative history of § 46b-127(b) establishes beyond any doubt that the legislature did not intend for defendants to receive a hearing in the juvenile court prior to transfers pursuant to

that section. Prior to 1995, § 46b-127 provided for the transfer of only those juveniles charged with the most serious felony offenses. The pre-1995 statute set forth express and comprehensive hearing procedures – both mandatory and discretionary – in the juvenile court prior to transfer. General Statutes (Rev. to 1993) § 46b-127, as amended by Public Acts, Spec. Sess., July, 1994, No. 94-2, § 6.[10] Specifically, the

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[10] After specifying in subsection (a) the offenses for which a juvenile may be transferred, General Statutes (Rev. to 1993) § 46b-127, as amended by Public Acts, Spec. Sess., July, 1994, No. 94-2, § 6, provides in relevant part:

"(a) . . . Not later than ten days after the filing of a motion to transfer a child to the regular criminal docket under subdivision (2) of this subsection, the child may file a notice of intent to request a hearing under subsection (c) of this section.

"(b) No such transfer shall be valid unless, prior thereto, the court has made written findings, after a hearing, that there is probable cause to believe that the child has committed the act for which he is charged. At such hearing, the child shall have the right to counsel and to confront witnesses against him. The procedures provided in section 54-46a shall apply at such hearing, except that the child shall have the right to move to suppress any admission made by him on the ground that it was obtained in violation of the provisions of subsection (a) of section 46b-137 and to obtain discovery of exculpatory evidence.

"(c) If the court makes a finding of probable cause, any child referred pursuant to subdivision (2) of subsection (a) of this section may request an immediate hearing at which he shall have the right to present evidence that he should not be transferred to the regular criminal docket because (1) he is a person with mental retardation, as defined in section 1-1g, or (2) he suffers from a substantial mental disorder, as defined in section 17a-75 or (3) an alternative plan or placement within the juvenile justice system has been arranged that will protect the

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statute mandated a probable cause hearing, and further provided that, if the juvenile court found probable cause, the juvenile could request a hearing to oppose transfer on specified statutory grounds. In addition, the juvenile transfer statute expressly established the juvenile's right to counsel at the hearings, the scope of what evidence may be considered at the hearings, the juvenile's right to discovery of exculpatory evidence, and the burden of proof to be satisfied at the hearings. In short, prior to 1995, § 46b-127 set forth in great detail the hearings to which a juvenile was statutorily entitled in juvenile court prior to transfer – in fact, the provision referred to a "hearing" six times. *See* General Statutes (Rev. to 1993) § 46b-127, as amended by Public Acts, Spec. Sess., July, 1994, No. 94-2, § 6.

In 1995, the legislature replaced this scheme with one that substantively mirrors the current statute, expanding the potential scope of transfers to juveniles charged with any felony. Tellingly, the new scheme omitted any mention of hearings, as well as standards that would have guided the juvenile court at such hearings. These omissions, considered in light of the extensive provisions of the prior scheme, strongly indicate the legislature's intent not

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community from further criminal conduct by the child. If the court, after such hearing, finds that a factor specified in subdivision (1), (2) or (3) of this subsection has been proven by a preponderance of the evidence, it shall not transfer such child to the regular criminal docket. . . ."

to provide any such hearings under the new statutory scheme.[11] This conclusion is further borne out by comments during the debate over the new scheme.

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[11] We note that the statute as amended in 1995 required transfer "[u]pon motion of a juvenile prosecutor and *approval* by the court"; (emphasis added) Public Acts 1995, No. 95-225, § 13; whereas the current statute requires transfer upon such motion and "order" of the court. General Statutes § 46b-127(b). This language was amended in 1998; *see* Public Acts 1998, No. 98-256, § 3; and nothing in the brief reference to this change in legislative debates reflects any intention to make a substantive change to the statute. *See* 41 H.R. Proc., Pt. 15, 1998 Sess., pp. 5188-89, remarks of Representative Michael P. Lawlor. Indeed, had the legislature intended to clarify that the juvenile court *is* vested with discretion to decide whether it is appropriate to try the juvenile as an adult, it would have employed language that more clearly reflected such an intent, rather than using a term that appears to indicate a less active role for that court.

The dissent vehemently argues that we have failed to give due weight to the legislature's rejection of two proposed amendments that would have mandated transfer of class C and D felonies ("shall transfer") upon the prosecutor's motion and its adoption instead of the aforementioned language providing that the court shall transfer upon such motion and *approval* by the court. *See* Substitute House Bill No. 7025, 1995 Sess., proposed Senate Amendment A and House Amendment B; *see also* Bill Status Report for Substitute House Bill No. 7025. We are mindful of the rejected amendments, but wholly disagree with the conclusion drawn by the dissent as to the impetus for the changes. First, we note the difference between these amendments and the bill as adopted was not simply the substitution of the language highlighted by the dissent. Rather, the rejected amendments did not require a finding of probable cause prior to the transfer. Therefore, we conclude that it is more logical to read the change on which the dissent relies in connection with the addition of the probable cause finding, such that the juvenile

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To put these comments in context, it is useful to understand that the 1995 amendment mandated the transfer of class A, class B and capital felonies, but permitted the prosecutor thereafter to file a motion to transfer the case of any child charged with the commission of a class B felony back to the juvenile court. Public Acts 1995, No. 95-225, § 13 (P.A. 95-225). As we previously have noted, with respect to class C and class D felonies, the prosecutor makes that decision prior to the transfer.

In the House of Representatives, a sponsor of P.A. 95-225, Representative Michael P. Lawlor explained that, under the Public Act, "when a prosecutor makes a motion to transfer any felony to the adult court, that transfer will take place automatically . . . assuming the prosecutor makes the motion, there's probable cause found in the ex parte hearing and the judge orders the transfer. There's no mandatory hearing

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court's "approval" simply reflects that the court must find this statutory predicate to transfer to have been satisfied. Second, and perhaps more significantly, the rejected amendments also would have eliminated both the confidentiality protections in place prior to the criminal court's acceptance of a transfer and the criminal court's discretion to return a transferred case to the juvenile court. Our review of the legislative history reveals no evidence as to which of these changes motivated the legislative rejection of these amendments. Accordingly, the legislature could have rejected these amendments for any of several reasons. *Cf. Ricigliano* v. *Ideal Forging Corp.*, 280 Conn. 723, 741-43, 912 A.2d 462 (2006) (declining to ascribe particular legislative intent to rejection of amendment that would have made other changes in addition to one on which party relied).

that needs to take place, other than that." 38 H.R. Proc., Pt. 8, 1995 Sess., p. 2936. Further clarifying the bill, Representative Lawlor later added that the bill was designed to "give the maximum discretion to the prosecutors that whenever they want to send any felony, not just the [c]lass A or [c]lass B felony, but any felony to the adult court, that transfer is automatic. In other words, there's no procedural steps between the decision to transfer and the transfer." *Id.*, p. 2953. In response to a question, Representative Lawlor explained the distinction between capital and class A felonies, as opposed to all other types of felonies, under the bill: "For a [c]lass A felony or a capital felony, [transfer is] not only automatic, but it's mandatory. The automatic [transfer] would apply to all other felonies." *Id.*, p. 2958. These statements clearly demonstrate a legislative intent that transfers for all felonies occur *automatically*, but, in the case of class C and class D felonies, are subject first to a motion by the prosecutor and the requisite findings. Representative Lawlor's statements summarizing the bill are particularly instructive, as they would have formed the basis for most representatives' understandings of the bill.[12]

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[12] The Appellate Court relied on comments by one legislator who was not a sponsor of the bill without apparently considering or giving due effect to the responses to those statements and earlier statements by the bill's sponsor, Representative Lawlor. *See State* v. *Fernandes*, *supra*, 115 Conn. App. 187. In our view, this particular exchange is ambiguous, and is particularly unclear as to whether the procedures at issue concerned the

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juvenile court or the criminal court. In light of Representative Lawlor's clear statements prior to this exchange that are cited in the text of this opinion, we do not find this exchange informative.

The following exchanges reflect the comments upon which the Appellate Court relied, along with Representative Lawlor's responses:

"[Representative Dale W. Radcliffe]: . . . Can an individual at that stage in the Superior Court seek a hearing in probable cause and does the court have the ability to grant such a hearing? . . .

"[Representative Lawlor]: . . . I suppose, as is often the case in any criminal proceeding, you can make whatever request you want, the statute would not provide for that, however.

"[Representative Radcliffe]: So then a judge . . . in carrying out this statute might determine that a hearing was appropriate and might decline to automatically transfer or transfer, even on a finding of probable cause based on the four corners of an affidavit. . . .

"[Representative Lawlor]: . . . [Y]es, that's true. All right." 38 H.R. Proc., *supra*, pp. 2961-62.

The following exchange between the legislators later ensued:

"[Representative Radcliffe]: . . . I do think we have an amendment here, however, that allows a judge, ex parte, on the basis of the affidavits to find probable cause and then still does not require that judge to approve the transfer, is that correct? . . .

"[Representative Lawlor]: . . . Yes, that's correct, but I would point out that in the bill with reference to the remarks that were just made a moment ago, we are changing this to be a criminal court. In fact, this will be a criminal session of the Superior Court, if this bill passes and, therefore, not some sort of special juvenile proceeding." *Id.*, p. 2966.

To the extent that the dissent also relied on comments made during debate by Representative F. Philip Prelli as refuting our

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We note that the 1995 amendment did not include the proviso in § 46b-127(a) expressly prohibiting argument in opposition to a transfer under § 46b-127(a). That language was added in 1997; *see* Public Acts 1997, No. 97-319, § 21; and there is no relevant legislative history. In light of the fact that the pre-1995 statute, which provided for transfer of only specific serious felonies, expressly provided detailed hearing procedures to challenge that transfer, it appears that the legislature in 1997 simply intended to make express its intent to eliminate the previously existing procedural protections. Its decision not to preclude expressly in § 46b-127(b) argument in opposition to transfer could mean either that the legislature deemed it unnecessary to address protections that never existed for class C and D felonies or that the legislature intended to leave open the possibility that the juvenile's counsel could oppose the transfer once it was under consideration by the criminal court. Accordingly, we conclude that § 46b-127(b) does not require the juvenile court to conduct a hearing to allow the child's counsel an opportunity to argue against transfer.

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interpretation of Representative Lawlor's comments, we decline to give greater weight to the former's comments, as, like Representative Radcliffe, Representative Prelli was not a sponsor of the bill and simply restated the statutory language providing that the court "approve" the transfer without shedding any light on that term's meaning. *See id.*, p. 2954, remarks of Representative Prelli.

Because the Appellate Court concluded, and the defendant claims, that due process also required a hearing before the juvenile court prior to the defendant's transfer, our conclusion that there is no statutory requirement of a hearing under § 46b-127(b) does not, by itself, resolve the present case. The requirements to prevail on a due process claim are well established. "The fourteenth amendment to the United States constitution provides that the [s]tate [shall not] deprive any person of life, liberty, or property, without due process of law. . . . In order to prevail on his due process claim, the [defendant] must prove that: (1) he has been deprived of a property [or *liberty*] *interest cognizable under the due process clause*; and (2) the deprivation of the property [or liberty] interest has occurred without due process of law." (Emphasis in original; internal quotation marks omitted.) *State* v. *Angel C.*, 245 Conn. 93, 104, 4 A.3d 248 (2010). In order to prevail on his due process claim, therefore, the defendant must first demonstrate that he has an interest in not being subjected to transfer under § 46b-127(b) that is cognizable under the due process clause.

"Liberty interests protected by the Fourteenth Amendment may arise from two sources – the Due Process Clause itself and the laws of the States." (Internal quotation marks omitted.) *State* v. *Matos*, 240 Conn. 743, 749, 694 A.2d 775 (1997). The defendant claims that he has a liberty interest emanating

from the statutory scheme governing the treatment of juveniles charged with crimes.[13] We agree.

"[O]nce a state provides its citizens with certain statutory rights beyond those secured by the constitution itself, the constitution forbids the state from depriving individuals of those statutory rights without due process of law." (Internal quotation marks omitted.) *Id.* The state, by statute, has vested juveniles charged with class C and class D felonies with certain rights beyond those guaranteed by the constitution. There is no question that "adjudication as a juvenile rather than prosecution as an adult carries significant benefits, chief among which are a determination of delinquency rather than criminality; General Statutes § 46b-121; confidentiality; General Statutes § 46b-124; limitations with respect to sentencing; General Statutes § 46b-140; erasure of files; General Statutes § 46b-146; and isolation from the adult criminal population. General Statutes § 46b-133. . . ." (Citation omitted.) *State* v. *Angel C.*, *supra*, 245 Conn. 103. These benefits, among others, were the focus of the United States Supreme Court in *Kent* v. *United States*, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966), which we have interpreted as holding "that if a statute vests a juvenile with the right to juvenile status, then that right constitutes a liberty interest, of which the juvenile may not be

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[13] In keeping with our decision in *State* v. *Angel C.*, *supra*, 245 Conn. 104, the defendant does not contend that any liberty interest emanates from the state or federal constitutions.

deprived without due process, i.e., notice and a hearing."[14] *State* v. *Angel C., supra*, 106.

The statutory scheme at issue in *Kent* operated similarly to the one at issue in the present case. That scheme provided that the juvenile court would have jurisdiction over the juveniles encompassed by the scheme, but "may, after full investigation, waive jurisdiction [over a child charged with a felony offense] and order such child held for trial [in adult criminal court]"; (internal quotation marks omitted) *Kent* v. *United States, supra*, 383 U.S. 547-48; but did not state any standards to govern the decision and did not provide for participation by the child or his counsel in that decision.[15] As we previously have indicated in our analysis of the statute, § 46b-127(b) implicitly indicates that the criminal court will conduct an evaluation to determine whether to accept the transfer, but does not specify a standard by which

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[14] The benefits to an individual of juvenile status were also the focus of the amici in this case. In addition to underscoring the importance of juvenile status, the amici also urge us to provide juveniles with an opportunity to present their case for retaining juvenile status before they are stripped of its benefits. Neither amicus suggests, however, that such an opportunity, so long as it is available before the loss of juvenile status, is in any way less valuable as a protection of the critical rights of a juvenile if it is provided before the criminal court, rather than before the juvenile court.

[15] The scheme at issue in *Kent*, however, did not expressly provide for assistance of counsel in relation to these transfer proceedings. Under our scheme, such protection expressly is provided. *See* General Statutes § 46b-123e(b).

to make that decision or the rights of the child or his representative to present argument to the court as to that matter. We do not find it significant that, under our scheme, the criminal court makes this evaluation instead of the juvenile court, because, as we previously have noted, our scheme requires that the protections that otherwise would be available to a juvenile remain in place until this evaluation is made.

In *Kent,* the facts differed in one important respect. There, the child's counsel had filed motions in the juvenile court seeking to obtain access to the information that had been accumulated by the court staff during the child's probation period and that would be available to the court in considering whether it should retain or waive jurisdiction. *Id.*, 546. The child's counsel had "represented that access to this file was essential to his providing [the child] with effective assistance of counsel. The [j]uvenile [c]ourt [j]udge did not rule on these motions. He held no hearing [regarding the waiver of jurisdiction]." *Id.*

The United States Supreme Court noted that "[i]t is implicit in [the juvenile court] scheme that non-criminal treatment is to be the rule – and the adult criminal treatment, the exception which must be governed by the particular factors of individual cases." (Internal quotation marks omitted.) *Id.*, 560-61. The court held: "There is no justification for the failure of the [j]uvenile [c]ourt to rule on the motion for [a] hearing filed by [the] petitioner's counsel, and it was error to fail to grant a hearing. We do not mean

by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment."[16] *Id.*, 561-62.

The state nevertheless claims that the liberty interest in juvenile status does not vest in those juveniles subject to § 46b-127(b). In support of this claim, the state points to our holding in *State* v. *Angel C., supra*, 245 Conn. 93. In that case, in response to a similar challenge to the mandatory transfer provision of § 46b-127(a), we concluded that due process does not require a hearing in juvenile court prior to transfer under that statute, because, in large part due to the mandatory nature of the transfer, the right to juvenile status does not vest in juveniles transferred under the mandatory transfer provisions relating to juveniles charged with class A or class B felonies. *Id.*, 106-108. The state claims that, pursuant to *Angel C.*, because the proceedings in the juvenile docket for

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[16] The United States Supreme Court construed the statutory mandate of a "full investigation" and the concern of arbitrariness in the absence of standards for the waiver of jurisdiction to require the juvenile court to state its reasons for waiving jurisdiction. *Kent* v. *United States, supra*, 383 U.S. 561. Although our statute does not contain similar language, we assume that the criminal court will state its reasons for declining to transfer the case back to the juvenile court and that, in the absence of such stated reasons, counsel for a child seeking review of such a decision will seek an articulation.

individuals transferred under § 46b-127(b) are, similarly to § 46b-127(a), administrative and not subjected to "meaningful" judgment by the juvenile judge, the liberty interest in juvenile status does not vest in juveniles transferred under § 46b-127(b).[17] We disagree.

Under the Connecticut scheme, unlike juveniles charged with class A or class B felonies, who automatically are transferred to adult court, a juvenile charged with a class C or class D felony is treated as a juvenile unless the prosecutor, in his discretion, moves for a transfer. The operation of § 46b-127(b), like the scheme at issue in *Kent,* differs from § 46b-127(a) in this one critical respect. The cases of juveniles charged under § 46b-127(b) or under the *Kent* scheme begin in juvenile court and move out of juvenile court only in those instances in which an actor, *in his discretion,* chooses to transfer the case. This stands in sharp contrast to the mandatory transfer under § 46b-127(a) of a juvenile charged with a class A or class B felony, who "has no right to avail himself of juvenile court jurisdiction because the statute

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[17] This claim fails to account for the fact, as admitted by the state, that until the criminal court exercises its discretion to accept a transferred juvenile case, the transferred individual retains all of the benefits of juvenile status. Accordingly, while the state is correct that the juvenile court itself performs a largely administrative role in § 46b-127(b) transfers, significant discretion and judgment is exercised by the criminal court prior to the revocation of the juvenile status, further bolstering the conclusion that the right to that status is vested.

expressly precludes the exercise of jurisdiction by the juvenile court. . . ." (Emphasis in original.) *State* v. *Angel C., supra*, 245 Conn. 108. Recognizing that distinction, we held that "*Kent* cannot be expanded, therefore, beyond the scope of discretionary transfer statutes to mandatory transfer statutes"; *id.*; like § 46b-127(a). In the case of discretionary transfer statutes, however, a juvenile does have a right to avail himself of juvenile court jurisdiction because his case is presumptively a juvenile case; while that right is alienable under § 46b-127(b), it is nevertheless protected by due process. Therefore, when, as here, treatment as a juvenile is the presumptive norm, and treatment as an adult is the exception, the right to juvenile status vests in the juvenile, and the discretionary transfer to criminal court, which is a revocation of juvenile status, constitutes a deprivation of a liberty interest cognizable under the due process clause. Accordingly, we must determine whether, in this case, that deprivation has occurred without the due process of law.

Because juveniles who are charged with class C or class D felonies have a vested interest in that status, they are, accordingly, entitled to "notice and a hearing" before they can be deprived of that interest. *State* v. *Angel C., supra*, 245 Conn. 106. The hearing to protect the due process right must be available prior to its deprivation. Because of the statutory protections in place prior to the acceptance of a transfer, juveniles do not lose any of the benefits of juvenile status until the criminal court accepts and

finalizes a transfer under § 46b-127(b); prior to the completion of that process, they remain juveniles. To adequately ensure due process, therefore, the hearing on the transfer must take place prior to the criminal court's acceptance of the juvenile's case, as only such a timely hearing would adequately protect the benefits of juvenile status that comprise the liberty interest. Section 46b-127(b) does not expressly provide for such a hearing, although, as we have noted, it does vest discretion to accept or return a transfer in the criminal court.

In order to preserve the constitutionality of a statute, this court can implement a judicial gloss on that statute. *See, e.g., State* v. *Cook,* 287 Conn. 237, 242, 947 A.2d 307, cert. denied, ___ U.S. ___, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008). In keeping with that authority, and consistent with what we perceive to be the legislature's intent, we clarify that, upon a transfer request by the prosecutor and a determination by the juvenile court that there is probable cause that the child committed the felony offense charged, under § 46b-127(b), the child so charged is entitled to a hearing before the judge of the criminal court docket prior to that court's decision to accept and finalize the defendant's case on the criminal court docket. Such a defendant is not, however, entitled to a hearing before the juvenile court; the legislative intent behind this statute clearly establishes that once a motion for transfer is properly made and

probable cause is found, the juvenile judge's obligation to order the transfer is ministerial.[18] This gloss is consistent with the text and legislative history of § 46b-127(b), because, insofar as the statute vests the criminal court with discretion to accept or return a transfer, and has divested the juvenile court of any meaningful discretion in this area, we conclude that the criminal court is the most appropriate place for the hearing to occur. In the absence of any statutory guiding principles that the criminal court is to consider in reaching its decision whether to retain or return the case, we decline to articulate a list of such considerations here. Indeed, the Supreme Court in *Kent* v. *United States*, *supra*, 383 U.S. 560-61, simply determined that the juvenile was entitled to an individualized assessment; it did not state that any specific factors must be considered.

In the present case, however, we need not consider whether the defendant was properly afforded an opportunity for such a hearing in the criminal court. On appeal, the defendant expressly has waived any claims arising from the proceedings in that court.[19]

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[18] We note additionally that the state has acknowledged that the criminal court is vested with discretion to accept or return a transferred case, and has never claimed that a hearing would be inappropriate.

[19] In the course of his submissions to this court, the defendant's counsel wrote a letter to the appellate clerk's office in which he stated: "[The defendant's] appeal *only* concerns the errors committed at [the November 11, 2005 juvenile court] hearing – the failure to hold a 'due process hearing' as is required by

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Because the defendant has claimed only that he was entitled to a hearing in the juvenile court prior to the transfer of his case, and because we have determined that neither § 46b-127(b) nor due process entitles him to a hearing in that forum, we conclude that his statutory and constitutional claims must fail.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the judgment of the trial court.

In this opinion ROGERS, C. J., and NORCOTT and VERTEFEUILLE, Js., concurred.

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the interpretation of the United States constitution by the [United States] Supreme Court and the interpretation of the Connecticut Constitution by the Supreme Court of Connecticut.

"The transcripts of the trial and the other proceedings in part A of the [regular] Superior Court are only relevant as to historical background. The [defendant] has waived any errors that might have occurred in that court. . . ." (Emphasis in original.)

EVELEIGH, J., with whom PALMER, J., joins, dissenting. I respectfully dissent. I disagree with the majority's conclusion that the Appellate Court improperly concluded that the failure to provide a hearing in the juvenile court on class C and D and unclassified felonies prior to the transfer of such cases to the regular criminal docket of the Superior Court, and to afford the defendant in the present case, who was fifteen years old at the time of the incident giving rise to his conviction, an opportunity to contest his transfer, violated the requirements of General Statutes (Rev. to 2005) § 46b-127(b).[1] Instead, I would conclude that the language of the statute and its legislative history reveal that the legislature intended to provide juveniles with an opportunity to contest their transfer at a hearing in the juvenile court. Accordingly, I would affirm the judgment of the Appellate Court, which had reversed the trial court's judgment convicting the defendant of assault in the second degree as an accessory, a class D felony, following the transfer of his case from the juvenile docket to the regular criminal docket of the Superior Court without conducting a hearing in the juvenile court.

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[1] Although I agree with the majority that a hearing in the criminal court satisfies due process requirements, I disagree that such a hearing satisfies the requirements of § 46b-127(b). I also note that such a hearing also satisfies due process concerns if held in juvenile court.

All references in this opinion to § 46b-127 are to the 2005 revision, unless otherwise indicated.

The majority opinion holds that the juvenile court's transfer of a class C, class D or unclassified felony is a "ministerial act." In my view, this conclusion completely ignores the fact that on two separate occasions in 1995 during the debate on the bill that resulted in the current statutory scheme, members of the legislature proposed amendments to the bill that would have made the transfer of these cases automatic upon the filing of a motion. Significantly, both amendments containing the aforesaid language were eventually rejected by the legislature in favor of the language "approval by the court," later changed to "order of the court." General Statutes (Rev. to 2005) § 46b-127(b). The rejection of these two amendments is a strong indication of the legislative intent to allow the juvenile court judge discretion to order or reject a transfer of the juvenile who was charged with commission of the aforesaid offenses. *See* 2A N. Singer & J. Singer, Sutherland Statutory Construction (7th Ed. 2008) § 48.18, pp. 621-22 ("the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment"). The importance of the legislative action is not mentioned by the majority. For this reason, coupled with other relevant legislative history, including comments by the original sponsor of the bill, as well as the inclusion of the language "order of the court," I dissent.

I agree with the majority with respect to the standard of review. The issue of whether the failure to provide a hearing in the juvenile court to afford the

defendant an opportunity to contest his transfer violated the requirements of § 46b-127(b) is a question of law, over which we exercise plenary review. *Ziotas* v. *Reardon Law Firm, P.C.*, 296 Conn. 579, 587, 997 A.2d 453 (2010). "The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter. . . . A statute is ambiguous if, when read in context, it is susceptible to more than one reasonable interpretation. . . . Additionally, statutory silence does not necessarily equate to ambiguity." (Internal quotation marks omitted.) *Hartford/Windsor Healthcare Properties, LLC* v. *Hartford*, 298 Conn. 191, 197-98, 3 A.3d 56 (2010).

At the outset, I note that, at oral argument before this court, the state conceded that a hearing of some sort must take place in juvenile court regarding the transfer of class C, class D or unclassified felonies. The state, however, would limit that hearing to: (1) a finding of probable cause; (2) a finding that the age of the juvenile was fourteen or over; and (3) a finding that the crime charged is a class C, class D or unclassified felony. Therefore, the dispute, as far as the state is concerned, is not the question of whether a hearing should take place but, rather, the extent of that hearing. I would allow the juvenile to further object to the transfer by argument of counsel, on the basis of the juvenile's prior record and involvement or lack thereof in the crime.

I begin my analysis with the relevant statutory text. General Statutes (Rev. to 2005) § 46b-127(b) provides: "Upon motion of a juvenile prosecutor and *order of the court*, the case of any child charged with the commission of a class C or D felony or an unclassified felony shall be transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court, provided such offense was committed after such child attained the age of fourteen years and the court finds ex parte that there is probable cause to believe the child has committed the act for which he is charged. The file of any case so transferred shall remain sealed until such time as the court sitting for the regular criminal docket accepts such transfer. The court sitting for the regular criminal docket may return any such case to the docket

for juvenile matters not later than ten working days after the date of the transfer for proceedings in accordance with the provisions of this chapter. The child shall be arraigned in the regular criminal docket of the Superior Court by the next court date following such transfer, provided any proceedings held prior to the finalization of such transfer shall be private and shall be conducted in such parts of the courthouse or the building wherein court is located as shall be separate and apart from the other parts of the court which are then being held for proceedings pertaining to adults charged with crimes." (Emphasis added.)

I would conclude that the plain language of § 46b-127(b) indicates that the legislature intended to vest the juvenile court with discretion over whether to transfer the case of a juvenile charged with a class C or D felony or an unclassified felony. Specifically, the statute requires an "*order of the court*" prior to any case involving a class C or D felony or an unclassified felony being transferred from the juvenile court to the adult court. General Statutes (Rev. to 2005) § 46b-127(b). The statute does not define the term order of the court. "When a statute does not provide a definition, words and phrases in a particular statute are to be construed according to their common usage. . . . To ascertain that usage, we look to the dictionary definition of the term." (Internal quotation marks omitted.) *Potvin* v. *Lincoln Service & Equipment Co.*, 298 Conn. 620, 633, 6 A.3d 60 (2010). Quoting from a treatise, Black's Law Dictionary provides as follows: "'An order is the mandate or

determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings.'" Black's Law Dictionary (9th Ed. 2009) p. 1206, quoting 1 H. Black, A Treatise on the Law of Judgments (2d Ed. 1902) § 1, p. 5. Accordingly, I would conclude that the legislature's use of the term order of the court in § 46b-127 indicates that the legislature intended the juvenile court to make a determination as to whether the case is appropriate for transfer to the adult court.

Indeed, if the legislature had intended the phrase order of the court to be merely a ministerial act, as contended by the majority, it could easily have said that upon a finding of probable cause, verification that the juvenile was over the age of fourteen, and that the crime was a class C, D or unclassified felony, the juvenile court shall transfer the case to the adult court. Instead, the legislature inserted the phrase "[u]pon motion of a juvenile prosecutor and order of the court. . . ." General Statutes (Rev. to 2005) § 46b-127(b). Further, I reject the premise enunciated by the majority to the effect that the use of the discretionary word "may" in the transfer statute would result in a duplication of effort, since the adult criminal court has discretion to send the case back to the juvenile court. First, it is axiomatic that if the juvenile court had discretion, it could reject the transfer and there would not be any duplication of effort. Second, the fact that a juvenile judge may approve the transfer should not affect the motivation of a

prosecutor in criminal court to pursue the case or for another judge to send the matter back to juvenile court. The motivation may be different for the respective parties. I certainly do not dispute the majority's proposition that the criminal court has discretion to accept or reject the matter. The hearing that I contemplate in juvenile court, however, would probably take ten to fifteen minutes. I do not consider this time period to be overly burdensome, even if another hearing were to take place in criminal court.

Furthermore, an examination of subsection (a) of § 46b-127, which sets forth the procedure for transferring any case involving a class A or B felony, provides further evidence that the legislature intended the juvenile court to be vested with some discretion over the transfer of a class C, D or an unclassified felony. General Statutes (Rev. to 2005) § 46b-127(a) provides in relevant part: "*The court shall automatically transfer* from the docket for juvenile matters to the regular criminal docket of the Superior Court the case of any child charged with the commission of a capital felony, a class A or B felony or a violation of section 53a-54d, provided such offense was committed after such child attained the age of fourteen years and counsel has been appointed for such child if such child is indigent. Such counsel may appear with the child but shall not be permitted to make any argument or file any motion in opposition to the transfer. . . ." (Emphasis added.) The use of the phrase "[t]he court shall automatically transfer" in subsection (a) of General Statutes (Rev. to 2005) § 46b-127

indicates that, where the legislature wanted to require the juvenile court to transfer a case without providing it with any discretion, it knew how to do so. In contrast, § 46b-127(b) only provides that "[u]pon motion of a juvenile prosecutor and *order of the court, the case . . . shall be transferred* from the docket for juvenile matters to the regular criminal docket of the Superior Court. . . ." (Emphasis added.) General Statutes (Rev. to 2005) § 46b-127(b). Indeed, if the legislature had intended the juvenile court to be without discretion in these matters, it could have provided, as it did in § 46b-127(a), language to the effect that "upon motion of a juvenile prosecutor, the court shall transfer the case." Furthermore, in § 46b-127(a), the legislature explicitly provided that "counsel may appear with the child but shall not be permitted to make any argument or file any motion in opposition to the transfer." General Statutes (Rev. to 2005) § 46b-127(a). The legislature did not include similar language regarding the role of the child's counsel in proceedings under subsection (b). I would conclude that the legislature's omission of both the mandatory transfer language and the explicit prohibition against argument by counsel from subsection (b) of § 46b-127 indicates that it intended the court to have a level of discretion in the transfer of cases under that subsection that it did not intend for cases under subsection (a) of § 46b-127. *See Saunders* v. *Firtel,* 293 Conn. 515, 527, 978 A.2d 427 (2009) ("when a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject

. . . is significant to show that a different intention existed" [internal quotation marks omitted]).

Nevertheless, I agree with the Appellate Court's conclusion in the present case that "[§ 46b-127(b)], however, does not provide guidance to the court on what discretion the court has to consider a motion to transfer." *State* v. *Fernandes,* 115 Conn. App. 180, 187, 971 A.2d 846 (2009). Accordingly, in accordance with § 1-2z, I would look to the legislative history of § 46b-127 to determine what level of discretion the legislature intended the juvenile court to have when considering a motion to transfer.

As the majority explains, § 46b-127 underwent substantial revisions in 1995 and was replaced with the predecessor to the scheme that operates today. I would point out that the pre-1995 scheme was different from the current scheme in three ways. First, as the majority acknowledges, prior to 1995, § 46b-127 only allowed for the transfer of the most serious felony offenses, which were specifically enumerated in the statute, including murder, assault, sexual assault, kidnapping, burglary, robbery and some firearm related crimes. General Statutes (Rev. to 1993) § 46b-127(a), as amended by Public Acts, Spec. Sess., July, 1994, No. 94-2, § 6. Second, the statute set forth a detailed procedure for the probable cause hearing. General Statutes (Rev. to 1993) § 46b-127(b), as amended by Public Acts, Spec. Sess., July, 1994, No. 94-2, § 6. Third, if the court made a finding of probable cause, any child, except for those charged with the commission of murder, could request a

hearing to present evidence that the case should not be transferred to the criminal docket because the child met one of the following criteria: (1) the child is a person with mental retardation; (2) the child suffers from a substantial mental disorder; or (3) an alternative plan or placement within the juvenile justice system has been arranged that will protect the community from further criminal conduct by the child. *See* General Statutes (Rev. to 1993) § 46b-127(c), as amended by Public Acts, Spec. Sess., July, 1994, No. 94-2, § 6.

In 1995, the legislature undertook substantial amendments to § 46b-127. *See* Public Acts 1995, No. 95-225, § 13 (P.A. 95-225). In making these amendments, the legislature acknowledged that it was trying "to fix what most people considered to be a broken criminal juvenile justice system." 38 H.R. Proc., Pt. 8, 1995 Sess., p. 2933, remarks of Representative Michael P. Lawlor. Indeed, a review of the legislative discussions surrounding the 1995 amendments demonstrates that the legislature sought to allow for more transfers of cases involving juveniles in an effort to address the juvenile crime problems that the state was experiencing. *See, e.g., id.*, p. 2942.

Representative Lawlor, the sponsor of the bill in the House of Representatives, acknowledged that "what we've intended to do is make it identical to the process by which cases are transferred between the two levels of the adult court. . . . So if the prosecutors make the motion to transfer in the adult system, the case automatically goes to the [p]art A court, the

higher court. Technically the judges retain some overall control on that process. They may feel there's too many cases coming, they may feel a case is really not serious enough. But I think most attorneys at least in the hall who do criminal cases would acknowledge that any time a prosecutor wants to send a case to [p]art A, it generally goes. We've attempted to use the same exact procedures for the transfer from the juvenile court to the adult court. Just to safeguard that not too many cases are transferred, such that they can't be prosecuted, but at the same time give the maximum discretion to the prosecutors that whenever they want to send any felony, not just the [c]lass A or B felony, but any felony to the adult court, that transfer is automatic. In other words, there's no procedural steps between the decision to transfer and the transfer." *Id.*, p. 2952-53.

I disagree with the majority's selective use of Representative Lawlor's statements. The majority quotes a portion of these comments by Representative Lawlor to support its conclusion that the juvenile court does not have discretion over whether to order the transfer. In doing so, however, the majority has completely disregarded Representative Lawlor's express statement that when a prosecutor makes a motion to transfer the case to adult court, the case will generally be transferred, however, "technically the judges retain some overall control on that process." *Id.* Reading Representative Lawlor's statements fully in context, I would conclude that he clearly indicated that the juvenile court would retain

ultimate discretion over whether to order the transfer.

Indeed, Representative Lawlor further clarified the role of the juvenile court in answering specific questions posed by other members of the House of Representatives. Notably, Representative Philip F. Prelli disagreed that Representative Lawlor's statements, which the majority cites in its opinion, were a correct interpretation of the bill. *See id.*, pp. 2953-54, remarks of Representative Prelli ("I disagree with his interpretation, a little bit . . . because, first of all, we're now talking about a judge in the juvenile court . . . he has to approve the transfer"). Furthermore, Representative Lawlor himself later clarified his interpretation. Representative Dale W. Radcliffe asked: "So then a judge . . . in carrying out this statute might determine that a hearing was appropriate and might decline to automatically transfer or transfer, even on a finding of probable cause based on the four corners of an affidavit. Is that true . . . ?" *Id.*, p. 2962. Representative Lawlor responded: "[Y]es, that's true." *Id.* Representative Radcliffe again asked: "I do think we have an amendment here, however, that allows a judge, ex parte, on the basis of the affidavits to find probable cause and then still does not require that judge to approve the transfer, is that correct?" *Id.*, p. 2966. Representative Lawlor responded: "Yes, that's correct. . . ." *Id.*

Indeed, an examination of the process leading to P.A. 95-225 reveals that the legislature considered and rejected proposals that would have removed the

language requiring "approval by the court" prior to transfer. For instance, Representative Radcliffe raised a proposed amendment to include part B felonies in the automatic transfer provision and to require that, "[o]n motion of a court advocate, the court shall transfer from the docket for juvenile matters to the regular criminal docket of the [S]uperior [C]ourt the case of any child charged with the commission of a class C or D felony or an unclassified felony. . . ." Substitute House Bill No. 7025, § 13, as amended by House Amendment Schedule B. This proposed amendment was defeated in the House. Once the bill reached the Senate, Senator Thomas Upson raised an amendment to make the transfer of class A and B felonies automatic and to require that, "[o]n motion of a court advocate, the court shall transfer from the docket for juvenile matters to the regular criminal docket of the [S]uperior [C]ourt the case of any child charged with the commission of a class C or D felony or an unclassified felony. . . ." Substitute House Bill No. 7025, § 13, as amended by Senate Amendment Schedule A. The Senate passed the version of this bill bearing Senator Upson's amendment. The bill then was referred to the committee on conference, which recommended rejecting this amended bill, but including class B felonies in the automatic transfer provision, which is the bill that ultimately passed both houses. *See* Bill Status Report for Substitute for Raised H.B. No. 7025, available at http://cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=7025&which_year=1995&SUBMIT1.x=8&SUBMIT1.y=16 (last visited January 4, 2011) (noting that

Senate Amendment Schedule A, originally passed in Senate on May 30, 1995, was later rejected by House on May 31, 1995, and committee on conference recommended its rejection; thereafter, House of Representatives rejected Senate Amendment Schedule A on June 3, 1995, and Senate similarly rejected on June 5, 1995). Thus, on two occasions, members of the legislature attempted to insert language that would have made the transfer of these cases automatic upon the filing of a motion. On both occasions, these attempts were defeated and the phrase approval by the court, later changed to order of the court, remained intact. "[T]he rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment." 2A N. Singer & J. Singer, *supra*, § 48.18, pp. 621-22. Accordingly, this is strong evidence that the legislature did not intend the transfer of class C, D or unclassified felonies to be automatic upon the filing of a motion by a prosecutorial authority.

As passed, P.A. 95-225 provided that § 46b-127(b) be amended as follows: "Upon motion of a juvenile prosecutor and approval by the court, the case of any child charged with the commission of a class C or D felony or an unclassified felony shall be transferred. . . . " P.A. 95-225, § 13. The legislature did not define the phrase approval by the court. Accordingly, I turn to the dictionary definition of the term "approval" to ascertain its common usage. *See Potvin* v. *Lincoln Service & Equipment Co.*, *supra*, 298 Conn. 633 ("When a statute does not provide a definition,

words and phrases in a particular statute are to be construed according to their common usage. . . . To ascertain that usage, we look to the dictionary definition of the term." [Internal quotation marks omitted.]). The American Heritage Dictionary defines approval as "[t]he act of approving . . . [a]n official approbation . . . sanction; [f]avorable regard" and defines "approve" as "[t]o consider right or good. . . . " The American Heritage Dictionary of the English Language (3d Ed. 1992). Webster's Third New International Dictionary (1993) defines approval as "the act of approving" and defines "approve" as "to judge and find commendable or acceptable." Accordingly, I would conclude that the term approval by the court demonstrates that the legislature intended the juvenile court to have the discretion to determine whether transfer was appropriate considering all of the issues involved.

As the majority recognizes, the language approval by the court was changed to order of the court in 1998. *See* Public Acts 1998, No. 98-256, § 3 (P.A. 98-256). As the majority also acknowledges, there is little legislative history surrounding this change and "nothing in the brief reference to this change in legislative debates reflects any intention to make a substantive change to the statute." *See* footnote 11 of the majority opinion; *see also* 41 H.R. Proc., Pt. 15, 1998 Sess., p. 5189. Moreover, a report on Substitute House Bill 5696 prepared by the office of legislative research, which was incorporated into P.A. 98-256, indicates that the legislature intended that the change of language from approval by the court to

order of the court would require even greater active involvement by the juvenile court. The report provides in relevant part as follows: "The bill requires that in order for a juvenile accused of a class C or D felony to be transfer[r]ed to adult court, the juvenile court must 'order' the transfer not just 'approve' a juvenile prosecutor's motion to transfer." Office of Legislative Research, Amended Bill Analysis for Substitute House Bill 5696, available at http://www.cga.ct.gov/ps98/fc/625.htm#ba (last visited January 4, 2011). "'Although the comments of the office of legislative research are not, in and of themselves, evidence of legislative intent, they properly may bear on the legislature's knowledge of interpretive problems that could arise from a bill.' *Harpaz* v. *Laidlaw Transit, Inc.*, 286 Conn. 102, 124 n.15, 942 A.2d 396 (2008); *cf. State* v. *Tabone*, 279 Conn. 527, 542, 902 A.2d 1058 (2006) (consulting analysis of bill by office of legislative research to ascertain legislative intent)." *State* v. *Courchesne*, 296 Conn. 622, 700, 998 A.2d 1 (2010); *see also Butts* v. *Bysiewicz*, 298 Conn. 665, 688 n.22, 5 A.3d 932 (2010). Accordingly, I would conclude that the use of the term order of the court in § 46b-127(b) evidences the legislature's intent to allow the juvenile court to exercise discretion in deciding whether to transfer a case involving a class C, D or unclassified felony.

Although it is not dispositive in construing § 46b-127, it is important to note that my construction of § 46b-127(b) so as to provide the juvenile court with discretion in determining whether to order the transfer of a case involving the commission of a class C, D

or unclassified felony to the regular criminal docket of the Superior Court is consistent with this state's current public policy favoring extending the length of time individuals are eligible for treatment by the juvenile court. Specifically, in 2007, the legislature decided to raise the age for the jurisdiction of the juvenile court and allow the juvenile court to have jurisdiction over most crimes committed by sixteen year olds (became effective January 1, 2010) and seventeen year olds (effective January 1, 2012). *See* generally Public Acts, Spec. Sess., June, 2007, No. 07-4, §§ 73 through 78 (P.A. 07-4); Public Acts, Spec. Sess., September, 2009, No. 09-7, §§ 69 through 93 (P.A. 09-7). In making these amendments, the legislature recognized the public policy in favor of making the unique resources of the juvenile court system available to more youth. The majority's interpretation of § 46b-127(b) is inconsistent with this public policy as it reduces the number of youths who are able to utilize the juvenile court system. Accordingly, I would conclude that allowing the trial court to have discretion over transferring cases involving juveniles charged with class C, D or unclassified felonies is consistent with the public policy of this state as embodied in P.A. 07-4 and 09-7.

It is also noteworthy that in a report on P.A. 07-4, the office of legislative research stated that it left unchanged the existing law on transfers that "(1) requires juvenile cases involving serious felonies to automatically be transferred to adult court and (2) *allows prosecutors to ask* juvenile court judges to transfer other cases to adult court." (Emphasis added.) Office

of Legislative Research, Amended Bill Analysis for Senate Bill 1500, available at http://cga.ct.gov/2007/BA/2007SB-01500-R00SS1-BA.htm (last visited January 4, 2011). As I have explained previously herein, "[a]lthough the comments of the office of legislative research are not, in and of themselves, evidence of legislative intent, they properly may bear on the legislature's knowledge of interpretive problems that could arise from a bill." (Internal quotation marks omitted.) *State* v. *Courchesne*, *supra*, 296 Conn. 700; *see also Butts* v. *Bysiewicz*, *supra*, 298 Conn. 688 n.22. The fact that as recently as 2007, the office of legislative research interpreted § 46b-127(b) to allow prosecutors "to ask" a juvenile court judge to transfer a case involving a class C, D or unclassified felony further bolsters my conclusion that the trial court has discretion over whether to grant the transfer in such cases.

Accordingly, I would conclude that the language of § 46b-127 and its legislative history demonstrate that the legislature intended to allow the juvenile court to exercise discretion in deciding whether to transfer a case involving a class C, D or unclassified felony. I would, therefore, conclude that a hearing is required in juvenile court, without evidence, but the juvenile may object to the transfer on the grounds of, inter alia, his involvement in the alleged crime and prior record, and the judge has discretion whether to transfer the case to the adult court. I would, accordingly, affirm the judgment of the Appellate Court.

CONNECTICUT APPELLATE COURT

STATE OF CONNECTICUT *v.* DAVID A. FERNANDES, JR.
(AC 28925)

McLachlan, Harper and Lavery, Js.

Argued November 19, 2008 – officially released June 16, 2009

(Appeal from Superior Court, judicial district of New London, Juvenile Matters, Driscoll, J.; [motion to transfer] Schimelman, J. [judgment])

Ralph U. Bergman, for the appellant (defendant).

David A. Smith, assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

LAVERY, J. The defendant, David A. Fernandes, Jr., appeals from the judgment of conviction, rendered after a jury trial, of one count of assault in the second degree as an accessory in violation of General Statutes §§ 53a8 and 53a-60(a)(1). The sole issue on appeal is whether the transfer of the defendant's case from the docket for juvenile matters to the regular criminal docket of the Superior Court followed the requirements of the juvenile transfer statute and due process. We conclude that the transfer of the defendant's case did not meet the requirements of due process and the transfer statute and, accordingly, reverse the judgment of conviction and remand the matter for a juvenile transfer hearing.

The following facts are relevant to the defendant's appeal. On September 12, 2005, the defendant was issued a juvenile summons and complaint /promise to appear on a charge of conspiracy to commit assault in the second degree in violation of General Statutes §§ 53a-48 and 53a-60.[1] The charge stemmed from an incident at the defendant's school on September 1, 2005. The defendant's date of birth is April 4, 1990, making him fifteen years old at the time of the incident. The defendant appeared in Juvenile Court on September 16, 2005, with counsel, and probable cause for the charge was found. On the defendant's November 11, 2005 appearance in Juvenile Court, the case was transferred to the criminal docket pursuant to General Statutes § 46b-127(b).[2]

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[1] Assault in the second degree has been classified by the legislature as a class D felony. General Statutes § 53a-60(b).

[2] General Statutes § 46b-127(b) provides: "Upon motion of a juvenile prosecutor and order of the court, the case of any child charged with the commission of a class C or D felony or an unclassified felony shall be transferred from the docket for juvenile matters to the regular criminal docket of the Superior Court, provided such offense was committed after such child attained the age of fourteen years and the court finds ex parte that there is probable cause to believe the child has committed the act for which he is charged. The file of any case so transferred shall remain sealed until such time as the court sitting for the regular criminal docket accepts such transfer. The court sitting for the regular criminal docket may return any such case to the docket for juvenile matters not later than ten working days after the date of the transfer for proceedings in accordance with the provisions of this chapter. The child shall be arraigned in the regular criminal docket of the Superior Court by the next

(Continued on following page)

The state, by substitute information, charged the defendant additionally with assault in the second degree as an accessory in violation of General Statutes §§ 53a8 and 53a-60(a)(1). The defendant's jury trial commenced in April, 2007. The jury found the defendant guilty of assault in the second degree as an accessory, and found him not guilty of conspiracy to commit assault in the second degree. On June 1, 2007, the court sentenced the defendant to a total effective term of three years incarceration, execution suspended after one year, with three years probation. This appeal followed.

The requirements for a successful due process claim are well established. "The fourteenth amendment to the United States constitution provides that the State [shall not] deprive any person of life, liberty, or property, without due process of law. . . . In order to prevail on his due process claim, [a defendant] must prove that: (1) he has been deprived of a property [or liberty] interest cognizable under the due process clause; and (2) the deprivation of the property [or liberty] interest has occurred without due process of law. . . . *State* v. *Matos*, 240 Conn. 743, 749, 694 A.2d 775 (1997); see *State* v. *Morales*, 240 Conn. 727, 739,

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court date following such transfer, provided any proceedings held prior to the finalization of such transfer shall be private and shall be conducted in such parts of the courthouse or the building wherein court is located as shall be separate and apart from the other parts of the court which are then being held for proceedings pertaining to adults charged with crimes."

694 A.2d 758 (1997). As a threshold matter, therefore, [a defendant] must show that [he has] a vested liberty interest in [his] juvenile status that is cognizable under the due process clause. *Frillici* v. *Westport*, 231 Conn. 418, 437-38, 650 A.2d 557 (1994). Liberty interests protected by the Fourteenth Amendment may arise from two sources – the due process clause itself and the laws of the states. *Meachum* v. *Fano*, 427 U.S. 215, [223-27, 96 S. Ct. 2532, 49 L. Ed. 2d 451] (1976). *Hewitt* v. *Helms*, 459 U.S. 460, 466, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983). . . .

As he must, the defendant concedes that his liberty interest in juvenile status does not emanate directly from the state or federal constitutions. See *State* v. *Angel C.*, 245 Conn. 93, 104, 715 A.2d 652 (1998). "Any [special treatment] accorded to a juvenile because of his [or her] age with respect to proceedings relative to a criminal offense results from statutory authority, rather than from any inherent or constitutional right. . . . [*State* v. *Matos*, supra, 240 Conn.] 755; *State* v. *Anonymous*, 173 Conn. 414, 417-18, 378 A.2d 528 (1977)." (Internal quotation marks omitted.) *State* v. *Angel C.*, supra, 104-105. "[O]nce a state provides its citizens with certain statutory rights beyond those secured by the constitution itself, the constitution forbids the state from depriving individuals of those statutory rights without due process of law." (Internal quotation marks omitted.) Id., 105, quoting *State* v. *Matos*, supra, 749.

Our Supreme Court "has repeatedly affirmed the significance of a transfer order in juvenile proceedings.

In *In re Ralph M.*, 211 Conn. 289, 302, 559 A.2d 179 (1989), [the court] recognized that the decision whether to issue a transfer order, because it implicates the relinquishment of juvenile jurisdiction, is a 'critically important' stage in the adjudicatory process. See *Kent* v. *United States*, 383 U.S. 541, 560-61, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966)." *In re Edwin N.*, 215 Conn. 277, 281, 575 A.2d 1016 (1990). Our Supreme Court in considering a due process claim regarding the mandatory transfer provisions of § 46b-127(a),[3]

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[3] General Statutes § 46b-127(a) provides: "The court shall automatically transfer from the docket for juvenile matters to the regular criminal docket of the Superior Court the case of any child charged with the commission of a capital felony, a class A or B felony or a violation of section 53a-54d, provided such offense was committed after such child attained the age of fourteen years and counsel has been appointed for such child if such child is indigent. Such counsel may appear with the child but shall not be permitted to make any argument or file any motion in opposition to the transfer. The child shall be arraigned in the regular criminal docket of the Superior Court at the next court date following such transfer, provided any proceedings held prior to the finalization of such transfer shall be private and shall be conducted in such parts of the courthouse or the building wherein court is located as shall be separate and apart from the other parts of the court which are then being held for proceedings pertaining to adults charged with crimes. The file of any case so transferred shall remain sealed until the end of the tenth working day following such arraignment unless the state's attorney has filed a motion pursuant to this subsection, in which case such file shall remain sealed until the court makes a decision on the motion. A state's attorney may, not later than ten working days after such arraignment, file a motion to transfer the case of any child charged with the commission of a class B felony or a violation of subdivision (2) of subsection (a) of section 53a-70 to the docket for juvenile matters for proceedings in

(Continued on following page)

held that there is no liberty interest in juvenile status prior to a mandatory transfer to criminal court. *State* v. *Angel C.*, supra, 245 Conn. 103.

The defendant relies heavily on *Kent* v. *United States*, supra, 383 U.S. 541, arguing that it mandates a hearing prior to any transfer of a juvenile to the criminal docket. In *State* v. *Angel C.*, our Supreme Court wrote that "*Kent* simply stands for the proposition that if a statute vests a juvenile with the right to juvenile status, then that right constitutes a liberty interest, of which the juvenile may not be deprived without due process, i.e., notice and a hearing. Id., 556-58. If the statute at issue does not create a liberty interest, *Kent* is inapposite." *State* v. *Angel C.*, supra, 245 Conn. 106-107.

In *Angel C.*, our Supreme Court was very specific in distinguishing the Connecticut transfer statute from that in *Kent*. The court held that the mandatory transfer provision of § 46b-127(a) "expressly precludes the exercise of jurisdiction by the juvenile court. . . . Moreover, it is implicit in § 46b-127(a), unlike the statute in Kent, that adult treatment is the rule for such juveniles and that juvenile treatment is a narrow exception. The applicability of *Kent* cannot be expanded, therefore, beyond the scope of

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accordance with the provisions of this chapter. The court sitting for the regular criminal docket shall, after hearing and not later than ten working days after the filing of such motion, decide such motion."

discretionary transfer statutes to mandatory transfer statutes. Section 46b-127(a) is a mandatory, not discretionary, transfer statute. It is an automatic, mandatory transfer statute with the transfer based exclusively on the age of the defendant and the offense charged. . . ." Id., 108-109. The Supreme Court in *Angel C.* concluded, therefore, that *Kent* did not require the conclusion that § 46b-127 (a) violated the defendants' rights to due process. See id., 108-109.

Whether § 46b-127(b) allows the court discretion to consider a motion for transfer is a question of statutory interpretation, over which our review is plenary. See *Roncari Industries, Inc.* v. *Planning & Zoning Commission*, 281 Conn. 66, 72, 912 A.2d 1008 (2007). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding

its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter. . . ." (Internal quotation marks omitted.) *State* v. *Koczur*, 287 Conn. 145, 152-53, 947 A.2d 282 (2008), quoting *Kinsey* v. *Pacific Employers Ins. Co.*, 277 Conn. 398, 405, 891 A.2d 959 (2006).

The language of § 46b-127(b) is exceptionally distinct from the mandatory language of subsection (a). To begin, subsection (a) expressly declares that the transfer is automatic and that counsel for the child "shall not be permitted to make any argument or file any motion in opposition to the transfer. . . ." General Statutes § 46b-127(a). No equivalent language exists in subsection (b). Instead, subsection (b) provides that the case shall be transferred only "[u]pon motion of a juvenile prosecutor and order of the court. . . ." General Statutes § 46b-127(b). The statute, however, does not provide guidance to the court on what discretion the court has to consider a motion to transfer. Because the court's level of discretion is unclear, we look to the legislative history for guidance.

The legislative history reveals that the transfer statute at issue in the present case was created to model the transfer procedure in the adult courts. 38 H.R. Proc., Pt. 8, 1995 Sess., p. 2952. Representative Dale W. Radcliffe clarified the authority maintained for judges within this process: "So then a judge . . . in carrying out this statute might determine that a

hearing was appropriate and might decline to automatically transfer or transfer, even on a finding of probable cause based on the four corners of an affidavit." Id., 2962. Further, the House approved an amendment that "allows a judge, ex parte, on the basis of the affidavits to find probable cause and then still does not require that judge to approve the transfer. . . ." Id., p. 2966, remarks of Representative Dale W. Radcliffe; see also id., p. 2973. We find that subsection (b) is distinct from the mandatory transfer provisions of subsection (a), because the plain language of the statute and the legislative history retains discretion for both the state's attorney and the judiciary on whether to transfer a juvenile charged with a class C or D felony to adult criminal court.

The plain language of General Statutes § 46b-120 et seq. rests original jurisdiction of children younger than sixteen years of age charged with an unclassified felony or a class C or D felony on the juvenile docket until a prosecutor makes a motion for transfer of the case and the court orders such a transfer. This original jurisdiction creates a liberty interest because the child has an interest in continuing to proceed within the juvenile docket. When a child is adjudicated on the juvenile docket, the proceedings are largely confidential, subject to erasure, and subject to a maximum commitment of four years. General Statutes §§ 46b-124, 46b-146 and 46b-141. This liberty interest, once bestowed by statute, cannot be taken away without due process. See *Kent* v. *United States*, supra, 383 U.S. 541. Due process requires notice of

the pending transfer and the opportunity for a hearing. See *State* v. *Angel C.*, supra, 245 Conn. 103.

In the present case, the defendant was represented by counsel when the motion was made to transfer the case to the adult criminal court. The prosecutor represented to the court that the companion case had been transferred to the adult court previously and that there was an interest in keeping the cases together. Counsel for the defendant argued for the court to exercise its discretion to keep the case within the juvenile system. The court responded by stating, "[u]nfortunately, the statute doesn't convey any discretion on the Juvenile Court. Discretion is posted solely in that of the . . . state's attorney's office, and the adult court judge would have the discretion to reject transfer; the Juvenile Court has no authority to do anything other than sign an order if requested by the prosecutor after a finding of probable cause." Counsel for the defendant perfected the record by arguing that the statute for class C and D felonies was discretionary and, therefore, requires the approval of the Juvenile Court.

Due process and § 46b-127(b) require that the defendant be afforded a hearing in which the Juvenile Court judge considers argument from counsel as to whether a case should be transferred to adult criminal court. In the present case, the court allowed defense counsel to make a record of the fact that the defendant had begun counseling and was attending school. The court, however, refused to exercise its discretion to consider the argument presented and to

determine whether it should order the transfer.[4] This refusal violated the defendant's rights to due process and was a misinterpretation of § 46b-127(b).

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other judges concurred.

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[4] "While it is normally true that this court will refrain from interfering with a trial court's exercise of discretion . . . this presupposes that the trial court did in fact exercise its discretion. . . . Where . . . the trial court is properly called upon to exercise its discretion, its failure to do so is error." (Citations omitted.) *State* v. *Martin*, 201 Conn. 74, 88, 513 A.2d 116 (1986).

SUPREME COURT

STATE OF CONNECTICUT

NO. S.C. 18449

STATE OF CONNECTICUT

v.

DAVID A. FERNANDES, JR. : FEBRUARY 17, 2011

ORDER

THE MOTION OF THE DEFENDANT-APPELLEE, FILED JANUARY 20, 2011, FOR RECONSIDERATION AND REHEARING, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY **ORDERED DENIED.**

BY THE COURT,

/s/ Michele T. Angers
MICHELE T. ANGERS
CHIEF CLERK

NOTICE SENT: FEBRUARY 17, 2011
HON. STUART M. SCHIMELMAN
CLERK, NEW LONDON, SUPERIOR COURT
(CR05-0284631T)
CONRAD OST SEIFERT
JAMES M. RALLS, SENIOR ASSISTANT
STATE'S ATTORNEY
CHRISTINE RAPILLO, SENIOR ASSISTANT
PUBLIC DEFENDER
MARSHA L. LEVICK
MARTHA STONE
REPORTER OF JUDICIAL DECISIONS

S.C. 18449

STATE OF CONNECTICUT
VS.
DAVID A. FERNANDES, JR.

SUPREME COURT
STATE OF CONNECTICUT
JANUARY 20, 2011

MOTION FOR RECONSIDERATION AND REHEARING

Pursuant to Practice Book § 71-5, the defendant-appellee in the above entitled action respectfully moves this Court for reconsideration of the decision in *State v. David A. Fernandes, Jr.*, ___ Conn. ___ (January 5, 2011.)

I. Brief History Of The Case

The defendant appealed from the judgement of conviction, rendered after a jury trial, of one count of assault second degree as an accessory, in violation of C.G.S. §§ 53a-8 and 53a 60(a)(1). The sole issue before the Connecticut Appellate Court was whether the transfer of the defendant's case from the juvenile court to the regular criminal docket of the adult court met the requirements of C.G.S. § 46b-127(b) and due process. See *State v. Fernandes*, 115 Conn. App. 180 (2009). The Connecticut Appellate Court, in a unanimous decision, reversed the defendant's conviction, holding that "due process and § 46b-127(b) require that the defendant be afforded a hearing in which the juvenile court judge considers, argument from counsel as to whether a case should be transferred to adult

criminal court" and that the juvenile court erred by refusing to exercise its discretion to consider the argument presented and to determine whether it should order the transfer." *Id* at 188-189. Following certification to this Court having been granted, this Court, in a 4 to 2 decision, reversed the Appellate Court's decision. This Court held that "the absence of a hearing in juvenile court did not violate statutory and due process requirements" and thus reversed the Appellate Court's judgment.

II. Specific Facts Relied Upon

The majority opinion states in part: "The . . . legislative history of § 46b-127(b) *establishes beyond any doubt that the legislature did not intend for defendants to receive a hearing before the juvenile court* prior to transfers pursuant to that section." [p. 11, emphasis added.] The dissenting opinion states in part: "Reading Representative Lawlor's statements fully in context, I would conclude that he *clearly indicated that the juvenile court would retain ultimate discretion over whether to order the transfer.*" [Dis. Op. J. Everleigh, J. Palmer, p. 6.] This dramatic divergence over a matter that should be and is determined by reviewing a transcribed factual record, directly controls the appellate outcome of this case. Thus, one specific fact relied upon regarding why reconsideration and rehearing should be granted is concern over which statement is correct. Either one or the other is correct, but both cannot be. If further review and consideration is afforded, it may well be

decided that the majority was mistaken regarding a crucial fact-bound interpretation.

Neither the majority nor the dissenting opinion claims that the legislative history is inadequate to determine legislative intent. If, prima facie, it appears that the legislator who spearheaded the statute, Representative Lawlor, in fact *did* say in legislative debate regarding the role of the juvenile court that the juvenile court's role was *not* limited to an automatic ministerial transfer function and instead said that the juvenile court *did* have the power and discretion to conduct a hearing which could result in no transfer to adult court – then reconsideration is warranted. The dissent made the following factual findings regarding the legislative debate.

> "Indeed, Representative Lawlor further clarified the role of the juvenile court in answering specific questions by other members of the House of Representatives. Representative Prelli disagreed that the language from Representative Lawlor that the majority cites in its opinion was a correct interpretation of the bill. See 38 H.R. Proc., Pt. 8, 1995 Sess., p. 2953. ('I disagree with his interpretation, a little bit . . . because, *first of all, we're now talking about a judge in the juvenile court* . . . he has to approve the transfer. . . .'). Furthermore, Lawlor himself later clarified his interpretation. Representative Dale W. Radcliffe asked: '*So then a judge . . . in carrying out this statute might determine that a hearing was appropriate and might*

> *decline to automatically transfer or transfer, even on a finding of probable cause based on the four corners of an affidavit. Is that true . . .* ' 38 H.R. Proc., Pt. 8, 1995 Sess., p. 2962. *Representative Lawlor responded: '[Y]es, that's true.'* Id. Representative Radcliffe again asked: 'I do think we have an amendment here, however, that allows a judge, ex parte, on the basis of the affidavits to find probable cause and then still does not require that judge to approve the transfer, is that correct?' 38 H.R. Proc., Pt. 8, 1995 Sess., p. 2966. Representative Lawlor responded: 'Yes, that's correct.' 38 H.R. Proc., Pt. 8, 1995 Sess., p. 2966" (Dis. Opinion, p. 6, emphasis added.)

Although some of these remarks may have been made during a debate on an earlier version of the statute, it is submitted that when, a number of days later, the modified and final version of the statute was debated, these remarks were not rendered irrelevant. Part of the challenge is that the parties did not directly address on appeal whether there was a means of saving the unconstitutional transfer statute by taking less drastic and remedial responsive action, one that preserved the statute, as opposed to the action the appellate court took. The State's brief analyzed the legislative debate and history in support of the State's absolutist position that the statute passed constitutional muster *as is*. The State also maintained that the statute's "plain wording implies that the juvenile court need not subjectively agree with or approve transfer, but rather must transfer

based on the neutral factors of the defendant's age and the existence of probable cause." (State's opening brief, p. 22.) The majority opinion found that the "order of the court' language in § 46b-127(b) simply refers to the ministerial act of directing the transfer after making the requisite probable cause finding." (Maj. Op. p. 10.) However, this conclusion was reached not because the language was plain, clear and unambiguous. Indeed, the majority opinion found that the "order of the court" provision "is susceptible to two competing interpretations: . . . the statute either *requires* the juvenile court to transfer the case, or vests the juvenile court with discretion to decide whether to transfer the case." (Maj. Op. p. 9.) Additionally, because C.G.S. § 1-2z requires consideration of related statutory provisions and because "the juvenile transfer statute distinguishes between the treatment of a child charged with the most serious offenses . . . and less serious felonies . . . 'subsection (a) expressly declares that the transfer is automatic . . . '" whereas "subsection (b) provides that the case shall be transferred only [u]pon motion of a juvenile prosecutor and order of the court" – subsection (b) could mean that the due process hearing occurs at the juvenile court. (*Id,* at 11.) Thus, "extratextural sources" were turned to for interpretative assistance. Id. This is consistent with *Barry v. Quality Steel Products, Inc.*, 280 Conn. 1 (2006). In *Barry* it was observed that there is a 'basic tenet of statutory construction that [w]e construe as a statute as a whole *and read its subsections concurrently* in order

to reach a reasonable overall interpretation." *Id.* at 9 (emphasis added).

That a juvenile facing charges such as the then 15 year-old defendant could only *potentially* be transferred to adult court based on the discretion of an actor (the juvenile prosecutor) choosing to transfer the case, creates the vested liberty interest. On this constitutional vesting point there is no disagreement. The majority opinion noted that "[b]ecause juveniles who are charged with Class C or Class D felonies have a vested interest in that status, they are accordingly entitled to 'notice and a hearing' before they can be deprived of that interest. *State v. Angel C.*, . . . 245 Conn 106." (Maj. Op. p. 20.) The majority and dissenting opinions are also in agreement with this constitutional conclusion resulting from there being a vested liberty interest. The failure of C.G.S. § 46b-127(b) to expressly provide for such a hearing therefore constitutes a constitutional flaw. Remedying a defective statute by applying judicial gloss when the statute can be preserved through such remedial construction certainly makes sound constitutional sense. It was not an endeavor that the appellate court undertook.

In the end, reconsideration should be granted because the stark contrast regarding what the legislature intended is not definitively resolved. In footnote 12 the majority states:

> "The Appellate Court relied on comments by one legislator who was not a sponsor of the bill without apparently considering or giving

> due effect to the responses to those statements and earlier statements by the bill's sponsor, Representative Lawlor. See *State v. Fernandes*, supra, 115 Conn. App. 187. *In our view, this particular exchange is ambiguous*, and is particularly unclear as to whether the procedures at issue concerned the juvenile court or the criminal court." (Maj. Opp. p. 14, emphasis added.)

If indeed the legislative debate *itself* is ambiguous and not so clear-cut as the majority (or perhaps even the dissenting) opinion make it out to be elsewhere, reconsideration is warranted so that the constitutional rule of lenity may be applied. In *In Re Williams D.*, 284 Conn. 305 (2007) this Court noted that the rule of lenity may apply when a statute is ambiguous and two different interpretations are possible even after applying other "tools of construction." (*Id.*, at 320.)

> "In support of his rule of construction, the respondent cites *Johnson v. Commissioner of Correction*, 258 Conn. 804, 820, 786 A.2d 1091 (2002). *Johnson* recognizes the rule of lenity, under which we strictly construe penal statutes against the state. Id. We need not to consider whether an extension of a delinquency commitment should be treated as akin to a penal statute for these purposes, however, because a necessary predicate to the application of the rule of lenity is a conclusion that the statute is ambiguous, meaning that it yields more than one reasonable interpretation *after have applied all of our tools of construction.* See *State v. Lutters*,

> supra, 270 Conn, at 219, 853 A.2d 434 ('courts do not apply the rule of lenity unless a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.')" (*Id.*, at 320-321.)

That may be the situation here, assuming arguendo that neither of the competing interpretations was exactly correct.

One other matter concerns the defendant. The majority opinion states that "the criminal court is the most appropriate place for the hearing to occur." (Maj. Op. p. 21.) The defendant recognizes that this statement was *not* made in a public policy context wherein the best interest of the child is a paramount concern. *In re Shahaira C.*, 297 Conn. 737 (2010). Rather, it was obviously made strictly in the statutory construction context, which in turn was strictly based on the majority's interpretation of legislative intent, which in turn was strictly based on the remarks of certain legislators back in 1995. However, Connecticut's current public policy embodied in P.A. 07-4 and 09-7 should not be ignored out of hand. The dissent notes that in passing these amendments (which "allow the juvenile court to have jurisdiction over most crimes committed by sixteen year olds"), the legislature recognized "the public policy in favor of making the unique resources of the juvenile court system available to more youth." (Dis. Op. p. 8.) Simply put, having the constitutionally required transfer hearing

conducted at the court dedicated to juvenile matters promotes this important public policy.[1] This public

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[1] The defendant is not implying that anything in the majority opinion suggests otherwise. Public policy considerations were not mentioned. That there are potential and serious life-changing consequences was described in the amici curiae's brief filed by the Center for Children's Advocacy and by the Juvenile Law Center. "In almost every state, adult criminal convictions, as distinguished from juvenile adjudications, bar individuals from employment in certain jobs and from accessing certain public benefits, and can even affect their family's housing. . . . Almost every job and higher education application asks about criminal convictions, while fewer ask specifically about juvenile adjudications. *Id.* And, finally, while almost every state provides for juvenile records expungement even for more serious offenses, adult criminal record expungement is usually limited to citations and minor misdemeanors, making it virtually an unavailable option for convicted persons. *Id.* Moreover, youth who are tried and detained as adults suffer grave consequences while in the adult criminal system and are typically at greater risk of recidivism. For example, one study found youth who were detained in New York's adult system were 85 percent more likely to be re-arrested for violent offenses, and 44 percent more likely to be arrested for property crimes than were youth committing similar offenses in the New York metropolitan area but detained within New Jersey's juvenile justice system. Fagan, J. (1996). *The comparative advantages of juvenile versus criminal court sanctions on recidivism among adolescent felony offenders. Law and Policy,* 18 (1&2), 77-113. Another study found youth in adult facilities were 500 times more likely to be sexually assaulted while incarcerated and 200 times more likely to be physically assaulted by facility staff (e.g., beaten) than were youth in the juvenile system. And, youth in adult facilities were eight times more likely to commit suicide than their counterparts held in the juvenile justice system." (Brief of Amici Curiae, pp. 9-10.) It should also be noted that the same amici filed an amicus curiae brief in *State v. B.B.*, Supreme Court Docket Number 18481. *B.B.* is a pending companion case which

(Continued on following page)

policy is consistent with the United States Supreme Court's recent decision in *Graham v. Florida*, 130 S. Ct. 2011 (2010). In *Graham*, our nation's highest court abolished life without parole sentences for juvenile offenders in non-homicide cases. *Id.* at 2046. One commentator notes:

> "*Graham* holds that youth have a right to rehabilitation (at least for youth charged with nonhomicide crimes), which may also be violated by proceeding in adult court. If youth are entitled to rehabilitation, perhaps there are arguments to keep youth in juvenile court because *that is the system that is designed to meet the rehabilitative needs of youth.*" Arya, N. *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 La. L. Rev. 99 at 150, Fall, 2010 (emphasis added).

Because the juvenile court is more "designed to meet the rehabilitative needs of youth" than the adult court, it stands to reason that from the public policy perspective, this potentially life-changing decision should be made by a juvenile court judge.

For the reasons stated above, this Court should grant this motion for reconsideration.

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addressed the issue of whether a presumptive youthful offender is entitled to a due process hearing prior to transfer to the adult court relative to C.G.S. § 54-76h(a).

III. Legal Grounds Relied Upon

This motion for reconsideration is being filed pursuant to P.B. § 71-5.

Respectfully Submitted,
David A. Fernandes, Jr.
Defendant-Appellee

BY: /s/ Conrad Ost Seifert

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CERTIFICATION

This is to certify, pursuant to Conn. Prac. Bk. § 62-7, that on the 20 day of January, 2011, a copy of the within motion for reconsideration was mailed, first class postage prepaid to all counsel of record and *amici,* to wit: James M. Ralls, Senior Assistant State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067 (Tel. phone: 860-258-5807; Fax 860-258-5828); Attorney Marsha L. Levick, Juvenile Law Center, 1315 Walnut Street, Suite 400, Philadelphia, PA 19107, (Tel. 215-625-0551; Fax 215-625-2808); Attorney Christine Perra Rapillo, Public Defender Services, 30 Trinity Street; 4th Floor, Hartford, CT 06106 (Tel. 860-509-6472; Fax 860-509-6495); Martha Stone,

Center for Children's Advocacy, 65 Elizabeth Street, Hartford, CT 06105 (Tel. 860-570-5327; Fax 860-570-5256); David Fernandes, Jr., 8 Kernwood Drive, Fredericksburg, VA 22407 (Tel. 540-710-0304).

It is further certified that the forgoing complies with all provisions of Conn. Prac. Bk. §66-3.

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